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IN THE

Supreme Court of the United States

October Term, 1974

No. 74-1390

TOWN OF LOCKPORT, NEW YORK, and FLOYD SNYDER, Individually and as Supervisor of the Town of Lockport,
Appellants,

vs.

CITIZENS FOR COMMUNITY ACTION AT THE LOCAL LEVEL, INC. and FRANCIS W. SHEDD, Individually and on Behalf of All Others Similarly Situated,
Appellees,

and

JOHN J. GHEZZI, Secretary of State of the State of New York, ARTHUR LEVITT, Comptroller of the State of New York, LAVERNE S. GRAF, Clerk of the County Legislature, County of Niagara, New York and KENNETH COMERFORD, County Clerk, County of Niagara, New York,
Appellees.

APPEAL FROM A THREE JUDGE COURT OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NEW YORK.

JURISDICTIONAL STATEMENT

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INDEX.

	PAGE
The Opinion Below	2
Jurisdiction	2
Constitutional and Statutory Provisions Involved	3
Questions Presented	5
Statement of Case	6
The Questions Presented are of Substantial Constitutional Importance	9
I. The Equal Protection Clause of the Fourteenth Amendment does not impinge upon the state's sovereign right to establish the structure of its subordinate governmental instrumentalities	9
II. Assuming the validity of the decision below, the District Court has improperly pre-empted the role and rights of the electorate	21
III. This action is barred by *res judicata*	22
Conclusion	24
Appendix A—Decision of the United States District Court for the Western District of New York, Entered on November 22, 1974	1a
Appendix B—Declaratory Judgment and Injunction	18a
Appendix C—Notice of Appeal to the Supreme Court of the United States	22a
Appendix D—Decision, April 3, 1973, District Court of the Western District of New York, *County of Niagara v. State of New York* (Civil 1972—656)	24a
Appendix E—Section 33-a Municipal Home Rule Law of New York	29a

TABLE OF CASES.

	PAGE
Avery v. Midland County, 1967, 390 U.S. 474	16
Baker v. Carr, 1962, 369 U.S. 186	9, 10, 14
Cipriano v. City of Houma, 1968, 395 U.S. 701	10, 18, 22
County of Niagara, New York v. State of New York, Civ. 1972-656	7, 8, 22, 23
Dusch v. Davis, 1966, 387 U.S. 112	17, 18
Fortson v. Morris, 1966, 385 U.S. 231	18
Gomillion v. Lightfoot, 1960, 364 U.S. 339	11, 14, 15, 16
Gordon v. Lance, 1971, 403 U.S. 1	17, 19
Gray v. Sanders, 1962, 372 U.S. 368	16
Hunter v. City of Pittsburgh, 1907, 207 U.S. 161	12, 13
Kramer v. Union Free School District No. 15, 1969, 395 U.S. 621	18
Phoenix v. Kolodziejski, 1969, 399 U.S. 204	10, 22
Reynolds v. Sims, 1964, 377 U.S. 533	10, 15, 17
Sailors v. Board of Education, 1967, 387 U.S. 105	11, 12, 15, 18
Salyer Land Company v. Tulare Lake Basin Water Storage District, 1973, 410 U.S. 719	10, 17
Wells v. Edwards, 1973, 409 U.S. 1095	18

STATUTES AND CONSTITUTIONAL PROVISIONS.

United States Constitution, Fourteenth Amendment	2, 5, 7, 8, 9
Article IV, Section 4	13, 16
New York Constitution:	
Article IX, Section 1(h)(1)	2, 3, 7, 23
Article XIX	20
New York Municipal Home Rule Law:	
Section 33(7)	2, 4, 7, 23
Section 33-a	10
Civil Rights Act (1970):	
28 U. S. C.:	
Section 1253	2
Section 1343(3)	2
Section 2281	2, 8
Section 2284	2, 8
42 U.S.C. Section 1983	2
Federal Rules of Civil Procedure, Rule 24	3
Article IX, Section 1, added 1963, McKinney's Consolidated Laws of New York, Book 2, Constitution	20

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APPEAL FROM A THREE JUDGE COURT OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NEW YORK.

JURISDICTIONAL STATEMENT

This is an appeal from a declaratory judgment and injunction entered on January 9, 1975 by a three Judge District Court for the Western District of New York. That Court

declared Article IX, § 1(h)(1) of the Constitution of the State of New York and § 33(7) of the New York Municipal Home Rule Law to be unconstitutional as in violation of the guarantee of equal suffrage under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. The Court ordered New York State and Niagara County officials to file and implement a new Charter for the County of Niagara of the State of New York despite the fact that the Charter had not received on referendum the votes required by the New York State Constitution and by the implementing statute for adoption of a new County Charter, that is, a majority of the votes cast in the cities of the County and a majority of the votes cast in the towns.

The Opinion Below

The opinion of the District Court for the Western District of New York (Appendix A, *infra*, pp. 1a-17a) is reported at 386 F.Supp. 1.

Jurisdiction

This suit was brought under Civil Rights Act, 42 U.S.C. § 1983 (1970) and 28 U.S.C. § 1343(3) (1970). A three judge District Court for the Western District of New York was convened pursuant to 28 U.S.C. §§ 2281 and 2284 (1970). Its decision was filed November 22, 1974 (Appendix A). The judgment of unconstitutionality and mandatory injunction was entered on January 9, 1975 (Appendix B, *infra*, pp. 18a-21a).

The jurisdiction of this Court to review this judgment on direct appeal is conferred by 28 U.S.C. § 1253.

The Town of Lockport, New York and Floyd Snyder, individually as a voter of the Town of Lockport and as

Supervisor of the Town of Lockport, obtained an order from the District Court on March 5, 1975 permitting intervention pursuant to Rule 24 of the Federal Rules of Civil Procedure. Notice of Appeal to this Court was filed and served by the intervening defendants (the appellants here) on March 6, 1975 (Appendix C, *infra*, pp. 22a-23a).

Constitutional and Statutory Provisions Involved

Article IX § 1(h)(1) of the Constitution of the State of New York provides:

> § 1. Bill of Rights for Local Governments
>
> Effective local self-government and intergovernmental cooperation are purposes of the people of the state. In furtherance thereof, local governments shall have the following rights, powers, privileges and immunities in addition to those granted by other provisions of this constitution:
>
> • • •
>
> (h) (1) Counties, other than those wholly included within a city, shall be empowered by general law, or by special law enacted upon county requests pursuant to section two of this article, to adopt, amend or repeal alternative forms of county government provided by the legislature or to prepare, adopt, amend or repeal alternative forms of their own. Any such form of government or any amendment thereof, by act of the legislature or by local law, may transfer one or more functions or duties of the county or of the cities, towns, villages, districts or other units of government wholly contained in such county to each other or when authorized by the legislature to the state, or may abolish one or more offices, departments, agencies or units of government provided, however, that no such form or amendment, except as provided in paragraph (2) of this subdivision, shall become effective unless approved on a referendum by a majority of the votes cast thereon in the area of the county outside of cities, and in the cities of the county, if any, considered as one unit.

Where an alternative form of county government or any amendment thereof, by act of the legislature or by local law, provides for the transfer of any function or duty to or from any village or the abolition of any office, department, agency or unit of government of a village wholly contained in such county, such form or amendment shall not become effective unless it shall also be approved on the referendum by a majority of the votes cast thereon in all the villages so affected considered as one unit.

Section 33(7) of the Municipal Home Rule Law of New York provides:

§ 33. Power to Adopt, Amend and Repeal County Charters

7. A charter law

(a) providing a county charter, or

(b) proposing an amendment or repeal of one or more provisions thereof which would have the effect of transferring a function or duty of the county, or of a city, town, village, district or other unit of local government wholly contained in the county, shall conform to and be subject to consideration by the board of supervisors in accordance with the provisions of this chapter generally applicable to the form of and action on proposed local laws by the board of supervisors. If a county charter, or a charter law as described in this subdivision, is adopted by the board of supervisors, it shall not become operative unless and until it is approved at a general election or at a special election, held in the county by receiving a majority of the total votes cast thereon (a) in the area of the county outside of cities and (b) in the area of the cities of the county, if any, considered as one unit, and if it provides for the transfer of any function or duty to or from any village or for the abolition of any office, department, agency or unit of government of a village wholly contained in the county, it shall not take effect unless it shall also receive a majority of all the votes cast thereon in all the villages so affected considered as one unit. Such a county charter or charter law

shall provide for its submission to the electors of the county at the next general election or at a special election, occurring not less than sixty days after the adoption thereof by the board of supervisors. Such a county charter or charter law may provide for the separate submission to the electors at such election of one or more variations of the provisions of such county charter. Any such variation may include, but shall not be limited to, proposed transfers of functions of local government to other units of local government or a class or classes thereof.

Questions Presented

The following questions are presented by this appeal:

1. The New York State Constitution and the New York Municipal Home Rule Law provide that the adoption, amendment or repeal of a county charter must be approved on referendum by a majority of those voting in areas outside of the cities in the county and by a majority of those voting in the cities within the county.

Do these provisions violate the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution?

2. A proposed new Charter for the County of Niagara, New York, failed to obtain majority approval of the votes cast in the towns of the County, but obtained majority approval of the total votes cast in the County in a November, 1972, referendum. Voter participation in the referendum was on the assumption that the State Constitution and the Municipal Home Rule Law properly required approval of a majority of the votes cast within the towns of the County and a majority of the votes cast in the cities of the County, and that a simple majority of all votes cast in the County would not be sufficient to enact the new Charter.

Was it appropriate or within the jurisdiction of the District Court for that Court to "change the rules after the game" and to order that the proposed Charter become effective on the basis of the November, 1972, referendum, as opposed to ordering a new referendum with prior advice to eligible voters that the rules will be different and that a simple majority of all of the votes cast will constitute approval of the Charter?

3. Is this action barred by *res judicata* by reason of the District Court's dismissal on the merits of a prior action raising the same issues, seeking the same relief, and brought by the County of Niagara acting on behalf of its citizens?

Statement of Case

On November 7, 1972 a proposed Charter establishing a new county government for the County of Niagara in the State of New York was put to referendum, as required by the New York State Constitution and the Municipal Home Rule Law (*supra*, pp. 3-5). The proposed Charter would effect major changes in the form and nature of county government, creating the positions of County Executive and Comptroller, and granting to the proposed new county government general governmental powers. The proposed Charter would provide the new county government with the authority to perform substantial governmental functions, including the power to establish a tax rate, to adopt laws and procedures relating to equalization of assessments, to issue bonds, to maintain county property and roads, and to administer health and public welfare services. Under the proposed Charter the cities within the County would retain substantially greater governmental autonomy than the towns would enjoy.

Article IX § 1(h)(1) of the Constitution of the State of New York and § 33(7) of the Municipal Home Rule Law of New York provide that the adoption, amendment or repeal of a county charter must be approved on referendum by a majority of those voting in areas outside of the cities in the county and by a majority of those voting in the cities within the county. There are eleven towns and three cities in the County of Niagara. The proposed Charter failed to obtain a majority of the votes cast in the towns: 10,665 voting for and 11,594 against. In the cities, the vote was: 18,220 for and 14,914 against.

Since the proposed Charter did not obtain the required affirmative votes, New York State officials refused to file the proposed new Charter as a duly enacted Local Law permitting the Charter to become effective.

On December 18, 1972, the County of Niagara (representing the citizens and voters of the County) commenced an action in the United States District Court for the Western District of New York against the State of New York, seeking a declaration that the governing New York constitutional and statutory provisions are violative of the equal protection clause of the Fourteenth Amendment to the United States Constitution (*County of Niagara, New York v. State of New York*, Civ. 1972-656). On April 3, 1973, the District Court filed its decision that the action should be dismissed on the merits (Appendix D, *infra*, pp. 24a-28a). The Order of dismissal was entered April 3, 1973. No appeal was taken. The plaintiff-appellees here made no effort to intervene in that case for purposes of prosecuting an appeal, or otherwise.

Nevertheless, on May 4, 1973, appellees commenced this action seeking the same relief as that denied by the District Court in *County of Niagara*, on the same grounds as those

dismissed on the merits in that action. Application was made by appellees, and granted, for the convening of a three judge District Court pursuant to 28 U.S.C. §§ 2281 and 2284.

During the pendency of this action, the same proposed new Charter for the County of Niagara was again put to referendum on November 5, 1974 in general elections. Once again, the proposed Charter failed to obtain the required majorities of votes.

On cross motions for summary judgment, the District Court noted that except for its decision in *County of Niagara:* "The precise issue here presented appears to be one of first impression." The District Court granted summary judgment to the plaintiff-appellees, holding, contrary to its decision in *County of Niagara,* that the New York State constitutional and statutory provisions governing the adoption of new county charters violate the equal protection clause of the Fourteenth Amendment. On January 9, 1975 a judgment and injunction was entered declaring those provisions to be unconstitutional and ordering the defendants to accept the Charter for filing, and to implement it, on the ground that the Charter had received a majority of the total number of votes cast in the 1972 referendum (Appendix B, *infra,* pp. 18a-21a).

The New York State Attorney General thereafter announced that an appeal would be taken to this Court, and that pending that appeal the Secretary of State would not accept the Charter for filing. Subsequently, and on or about February 13, 1975, the Attorney General announced that an appeal would not be taken. The appellants were therefore granted permission on March 5, 1975 to intervene. This appeal was filed with the United States District Court for the Western District of New York on March 6, 1975.

THE QUESTIONS PRESENTED ARE OF SUBSTANTIAL CONSTITUTIONAL IMPORTANCE

I. The Equal Protection Clause of the Fourteenth Amendment does not impinge upon the state's sovereign right to establish the structure of its subordinate governmental instrumentalities.

This is a case of first impression. It involves a proposed major enlargement and extension of the "one person, one vote" rule of *Baker v. Carr,* 1962, 369 U.S. 186, to inhibit the establishment by a state of its subordinate governmental instrumentalities.

No claim is made that the provisions of the New York State Constitution or of the New York State Municipal Home Rule Law which were declared unconstitutional by the District Court directly or indirectly deprive any citizen of voting equality with reference to the election of representatives, whether state, local or federal.

What is attacked is the acknowledged sovereign and exclusive right of a state to determine what subordinate governmental instrumentalities it will create to assist in carrying out state governmental functions, what structure those municipal facets of state government will have, and to prescribe the procedures by which it will make those determinations.

The question raised is whether the Equal Protection Clause of the Fourteenth Amendment requires a state to afford its citizens the right to determine, by election process compatible with the "one person, one vote" concept, the form or structure of municipal governments within the state. This question has not been passed upon by this Court. It is a question of extensive consequence which

merits plenary consideration. Significant issues concerning the separation of powers and the sovereign right of the state to establish and control its local governmental agencies are involved.

The decision below results in an extension of the "one person, one vote" principle and the coincident extension of judicial control into political areas never contemplated by the decisions spawning that principle. The final decision in this case will have critical and far-reaching effects on local government interrelationships within the entire State of New York. A holding of unconstitutionality here must also strike down other similar statutory provisions which provide safeguards against coerced annexation of local units by their larger neighbors. (See Section 33-a Municipal Home Rule Law of New York, Appendix E, *infra*, p. 29a). The issues are of vital importance.

With but rare exceptions, previous cases in which this Court has invoked the "one person, one vote" rule have involved the election of governmental representatives. *Baker v. Carr, supra*; *Reynolds v. Sims*, 1964, 377 U.S. 533; *Salyer Land Company v. Tulare Lake Basin Water Storage District*, 1973, 410 U.S. 719, and cases reviewed therein. The exceptions have related to the approval of general obligation bonds, *Phoenix v. Kolodziejski*, 1969, 399 U.S. 204, and to the approval of revenue bonds, *Cipriano v. City of Houma*, 1968, 395 U.S. 701.

In no case has this Court extended or indeed presaged the extension of *Baker v. Carr* to the process of the state's selection of the form and structure of its local municipal governments.

Consideration of the issues presented on this appeal must begin with the proposition—long acknowledged by

this Court—that the states have the exclusive right and authority, without interference from the federal government or judiciary, to establish, modify or abolish local government units and structures. As the Court unanimously observed in *Gomillion v. Lightfoot*, 1960, 364 U.S. 339, 343, the creation by the state of its municipalities is "clearly a political act".

In holding that the selection of members of a county school board did not necessitate an election, and that accordingly the principle of "one person, one vote" had no relevancy, the Court began its consideration in *Sailors v. Board of Education*, 1967, 387 U.S. 105, with the observation that:

> "We start with what we said in *Reynolds v. Sims, supra*, at 575:
>
> 'Political subdivisions of States—counties, cities, or whatever—never were and never have been considered as sovereign entities. Rather, they have been traditionally regarded as subordinate governmental instrumentalities created by the State to assist in the carrying out of state governmental functions. As stated by the Court in *Hunter v. City of Pittsburgh*, 207 U.S. 161, 178, these governmental units are "created as convenient agencies for exercising such of the governmental powers of the State as may be entrusted to them, " and the "number, nature and duration of the powers conferred upon [them] . . . and the territory over which they shall be exercised rests in the absolute discretion of the State." '
>
> "We find no constitutional reason why state or local officers of the nonlegislative character involved here may not be chosen by the governor, by the legislature, or by some other appointive means rather than by election. Our cases have, in the main, dealt with elections for United States Senator or Congressman (*Gray v. Sanders, supra*; *Wesberry v. Sanders*, 376 U.S. 1) or for state officers (*Gray v. Sanders, supra*) or for state

legislators. *Reynolds v. Sims, supra*; *WMCA, Inc. v. Lomenzo*, 377 U.S. 633; *Davis v. Mann*, 377 U.S. 678; *Roman v. Sincock*, 377 U.S. 695; *Lucas v. Colorado Gen. Assembly*, 377 U.S. 713; *Marshall v. Hare*, 378 U.S. 561.

"They were all cases where elections had been provided and cast no light on when a State must provide for the election of local officials." (387 U.S. at 107-8)

The Court thus reaffirmed the essential principle stated in its *Hunter v. City of Pittsburgh*, 1907, 207 U.S. 161, decision that the "number, nature and duration of the powers conferred upon" municipalities "rests in the absolute discretion of the state".

The language of the Court in *Hunter* further reflects what must be the touchstone for review of the findings of unconstitutionality in the case at bar:

"Municipal corporations are political subdivisons of the State, created as convenient agencies for exercising such of the governmental powers of the State as may be entrusted to them. For the purpose of executing these powers properly and efficiently they usually are given the power to acquire, hold, and manage personal and real property. The number, nature and duration of the powers conferred upor these corporations and the territory over which they shall be exercised rests in the absolute discretion of the State. Neither their charters, nor any law conferring governmental powers, or vesting in them property to be used for governmental purposes, or authorizing them to hold or manage such property, or exempting them from taxation upon it, constitutes a contract with the State within the meaning of the Federal Constitution. The State, therefore, at its pleasure may modify or withdraw all such powers, may take without compensation such property, hold it itself, or vest it in other agencies, expand or contract the territorial area, unite the whole or a part of it with another municipality, repeal the charter and destroy the corporation. *All this may be done, conditionally or unconditionally, with or without the consent of the citizens, or even against their protest.* In all these respects the State is supreme, and its legislative body, conforming to its action to the state constitution, may do as it will, unrestrained by any provision of the Constitution of the United States." (207 U.S. 161, at 178-9; emphasis supplied).

It is thus clear that the state, acting through and by its duly elected representatives, has the sovereign right to determine what subordinate instrumentalities it will employ to carry out its functions, and the coincident sovereign right to establish and to fix the means or procedures by which it will exercise this clearly political function. Should it desire to do so, the state would have the authority to vest in its governor, or in some designated official—elected or appointed—the authority to determine and to prescribe the form and structure of municipal governments, and no citizen could demand as a matter of constitutional right that those determinations be made by vote of local residents. The matter is clearly political, and subject to political determination. The governing constitutional requirement is not the Fourteenth Amendment. The mandate is Article IV, Section 4, of the Constitution, requiring that the state's form of government be "Republican". There is no claim here of any violation of that constitutional requirement.

Distilled to its essence, appellee's position is that no state has the constitutional right to establish and control the "number, nature and duration of the powers conferred upon" the state's subordinate governmental instrumentalities without obtaining voter approval—on a "one person, one vote" basis—of the citizens of the territory involved. There has been no holding of this Court supporting such a proposition. While the Court has repeatedly

held since *Baker* that equal suffrage is a constitutional necessity with respect to the election of government representatives, the Court has never held that the authority of the state to create and to determine the appropriate form and structure of its subordinate governmental instrumentalities is limited or proscribed by any requirement of voter approval. On the contrary, the Court has repeatedly held that such matters are purely political in nature and subject to the exclusive control of the state acting in its sovereign capacity.

The District Court here reasoned however that although the state was not constitutionally obliged to permit voter participation in the matter of prescribing the form of its subordinate units of government, if it in fact allowed any such participation, it must do so only on a "one person, one vote" basis. To reach this conclusion the District Court placed reliance on decisions of this Court which are inapposite to the issue here involved.

The District Court relied principally on the following language from *Gomillion:*

> "When a State exercises power wholly within the domain of state interests, it is insulated from federal judicial review. But such insulation is not carried over when state power is used as an instrument for circumventing a federally protected right. This principle has had many applications. It has long been recognized in cases which have prohibited a State from exploiting a power acknowledged to be absolute in an isolated context to justify the imposition of an 'unconstitutional condition.' What the Court has said in those cases is equally applicable here, *viz.*, that 'Acts generally lawful may become unlawful when done to accomplish an unlawful end, *United States v. Reading Co.*, 226 U.S. 324, 357, and a constitutional power cannot be used by way of condition to attain an unconstitutional result.'" (364 U.S. 339, at 347-8).

The Court below acknowledges that in the creation and structuring of subordinate governmental instrumentalities the state is exercising sovereign power "wholly within the domain of state interest" which is insulated from federal judicial review. But the conclusion is then assumed that there is "a federally protected right" which is being circumvented by state power. The unanswered but dispositive question here is: What is the "federally protected right" which the state constitution and statute offend? It is not the right to participate on an equal basis in the election of representatives, for there is and can be no claim of violation of that right. It cannot be the right to participate by direct local vote in the determination of the nature of powers to be exercised by local governments, for the teaching of *Hadley, Reynolds* and *Sailors* is that no such constitutional right exists.

In *Gomillion,* the Court was dealing with the exercise of state power to effect a blatant discriminatory gerrymandering designed to deprive black voters of their franchise to elect government representatives. The federally protected right in *Gomillion* is the undisputed constitutional right of all voters to participate on an equal basis in the selection of elected representatives. That issue—that "federally protected right"—is not involved in this case. The appellees do *not* have a "federally protected right" to participate by direct vote in the structuring of the state's local governmental units.

Moreover, no "unlawful end" is being accomplished by the New York Constitution or its Home Rule Law. The end here is the establishment or modification of subordinate local government—a legal end as to the accomplishment of which the state concededly has full and exclusive power.

Nor is any constitutional power being "used by way of condition to attain an unconstitutional result". The result here is not unconstitutional. The state has the right to create its own subordinate government units on such terms as it may select provided only that the citizens of the state are afforded a "Republican Form of Government" within the meaning of Article IV of the Constitution. With or without the proposed new Charter, Niagara County is and would be governed by a "Republican Form of Government" through a legislative body selected in accordance with the "one person, one vote" mandate.

Gomillion does not stand as authority for the District Court's decision in this case. Indeed, it militates strongly against that decision.

Nor is the determination below either mandated or supported by *Gray v. Sanders*, 1962, 372 U.S. 368, or by *Avery v. Midland County*, 1967, 390 U.S. 474. In *Gray*, the Court was again reviewing the process of election of government representatives, holding that since Georgia regulated the conduct of party primaries through exercise of state powers, its action with respect to that part of the representative election process was state action, thus affording standing to sue to any citizen whose right to vote for such elected representatives was impaired by that state action. The protected right involved in *Gray* as well as in *Avery* is the right of the citizen to vote on an equal basis with all other voters for elected representatives, and not to have state action debase or dilute that specific constitutionally protected right. The charter referendum procedures in New York in no way impinge upon that existing, insured right.

It is not a matter of semantics to urge upon this Court the proposition that the determination of the form and structure of subordinate state government instrumentalities is a political matter over which the people of the state as a whole, by exercise of their political rights, have exclusive control.

The New York State procedure under review was designed and operates to require something more than a mere majority approval to effect a change in the form of county government and consequent changes in the interrelationships between county authority and city, town and village authority. *Gordon v. Lance*, 1971, 403 U.S. 1. The procedure recognizes that the needs of localities are often best served by the exercise of governmental power by smaller political units which are closer to the people, more intimately familiar with their local problems and needs, and more directly responsive to the people. *Dusch v. Davis*, 1966, 387 U.S. 112. The procedure was designed to exercise the state's sovereign right in such a fashion that neither the city dwellers' rights with respect to city government, nor the town dwellers' rights with respect to town government, could be overridden without mutual consent. *Salyer Land Co. v. Tulare Water District, supra.*

This Court has not yet stripped the states of all governmental discretion and flexibility even in situations involving the election of representatives. In *Salyer* it was held that the "popular election requirements enunciated by *Reynolds*" were inapplicable to general elections of a Water Storage District, and that California could constitutionally limit the vote to landowners as distinguished from nonlandowners and lessees. Of course, the challenged New York constitutional and statutory provisions do not go so far. No voter qualified to vote in general elections is prohibited

from voting. The dual majority provisions provide a system of "checks and balances" while granting voter participation in matters where no constitutional right to vote exists.

The "one person, one vote" principle is surely not some omnipresent, all encompassing, all governing presence hovering over and intruding into all state and local functions and activities. *Cipriano* and *Kramer v. Union Free School District No. 15,* 1969, 395 U.S. 621, tell us that in particular circumstances, outright exclusions of qualified voters may be "necessary to promote a compelling state interest" (at 627). In *Wells v. Edwards,* 1973, 409 U.S. 1095, Louisiana constitutional provisions for the election of state Supreme Court Justices from election districts established without regard to population, were upheld in the face of a "one person, one vote" attack. See *Fortson v. Morris,* 1966, 385 U.S. 231.

In *Dusch,* the Court upheld an election plan for the selection of representatives which was in part based on candidate borough residency requirements, without regard to population, observing that the plan ". . . seems to reflect a detente between urban and rural communities that may be important in resolving the complex problems of the modern megolopolis in relation to the city, the suburbia, and the rural countryside" (387 U.S. 112, at 117).

The restraining and tempering views of the Court as expressed in *Sailors,* must not be lost in pursuit of a simplistic and insensitive extension of a principle beyond the bounds of its reason d'etre:

> "Viable local governments may need many innovations, numerous combinations of old and new devices, great flexibility in municipal arrangements to meet changing urban conditions. We see nothing in the Constitution to prevent experimentation." (387 U.S. 105, at 111)

What would the Court say if the provisions under attack required not a dual majority but a 60% or 65% or 70% majority vote of the whole? Depending on the population mix of the particular county, the city or town residents might be heard to complain that a disproportionate weighting was being accorded to the numerically smaller group. The same cries of "veto power" and deprivation of equal suffrage as are made in this case would be heard. But, the Court would say, as it should here:

> "Certainly any departure from strict majority rule gives disproportionate power to the minority. But there is nothing in the language of the Constitution, our history, or our cases that requires that a majority always prevail on every issue" (*Gordon v. Lance,* 403 U.S. 1, at 6, upholding a 60% referendum approval of bonded indebtedness or increases in tax rates).

The procedure adopted by the people of New York State recognizes that there are in fact important legal and factual differences between the form and nature of city government as selected by the voters resident within the city, and the form and nature of the town form of government as selected by the voters resident within the towns. There are important practical differences between the governmental needs of these two differing types of residents. The wisdom of the people of the state as a whole was to give protection to each against encroachment and dilution of chosen local government powers by requiring that before any county government could be superimposed or modified, a majority of the voters in the towns approve, and a majority of the voters in the cities approve. This is a reasonable and responsible exercise of the state's sovereign political right to determine its own form of government.

Nor can it be claimed that the urban resident is disadvantaged by this procedure. The basic constitutional provi-

sions were adopted and approved by the voters of the state as a whole acting on referendum as recently as 1963 (Article IX, Section 1, added 1963, McKinney's Consolidated Laws of New York, Book 2, Constitution). The procedure is subject to change by the same political means by which it was initially adopted. There is a constitutionally appropriate means of political change. Since approximately 10.6 million people reside within the cities of the state, while approximately 7.5 million live in the towns, urban voters have the numerical potential to effect such change if desired (New York State Constitution, Article XIX).

Since 1965, new charters for county government have been proposed to the citizens of 14 counties. Three charters were adopted by obtaining the complementary dual majority votes required. Eight charters failed to obtain a majority vote in either the towns or in the cities of the county. One failed to obtain majority approval of the city voters; two (including Niagara County) failed to obtain majority approval of town voters. This experience demonstrates that the provisions in question do not operate to the advantage or disadvantage of any defined group of citizens.

The proposed Niagara County Charter involves major modifications in political approach. It would effect the realignment and transference of existing government functions and prerogatives among and from local government units to the proposed county government unit. The citizens residing in the towns within the county have a direct stake in their existing town governments and in the powers and authorities with which those governments operate. The same is true of city residents with respect to city governments. Accordingly, it is altogether proper to require the unit majority approval of these two classes of government

instrumentalities to the superimposition of a new county government which would have very material effects on existing local control of local matters, and on the responsibility for and payment of various services. The complementary majority approval procedure is justifiable even if the "one person, one vote" concept were to have application to this kind of state political action.

II. Assuming the validity of the decision below, the District Court has improperly pre-empted the role and rights of the electorate.

Essential to the integrity of any voting process is knowledge on the part of those qualified to vote as to the consequences and effect of the vote cast or not cast. As in any situation, to obtain a *bona fides* result, those involved and affected must "know the rules of the game" before the game is played.

The voters of Niagara County were not once, but twice, offered the proposed new Charter in referenda held on the basis that to become effective, the Charter must obtain the dual majority required by the State Constitution. Votes were cast or not cast in reliance on that premise. Pre-referendum political efforts at persuasion or education were also based on the proposition that the Charter could not become effective without the dual majority. The referendum was *not* conducted, and the voters did *not* act, on the premise that a simple majority of the total votes cast countywide would be sufficient to provide approval.

The District Court, however, changed the rules after the game was twice played and held that under new and different rules, pursuant to which no voter had acted, the proposed Charter had gained approval. In so doing, the Dis-

trict Court to make decisions and to take actions (both before and at the time of the referendum) with knowledge of what the requirements for approval are.

The relief granted by the District Court assumes an unproven and unprovable conclusion: that the results of the referendum would have been the same if the voters had known in advance that the rules were different than they thought and that a simple majority would control. Equality of voting rights and the "one person, one vote" concept necessitate an exercise of the voting prerogative with advance knowledge of the consequences of the vote cast.

It was improvident and violative of voter rights for the District Court to order the Charter to become effective without a referendum on the new terms prescribed. Even if the finding of unconstitutionality had merit, the equitable and proper relief would be to order or permit a new referendum based on the new rules. *Cipriano v. City of Houma, supra; Phoenix v. Kolodziejski, supra.*

III. This action is barred by *res judicata*.

Standing alone, the *res judicata* bar of the District Court's earlier decision on the same subject in *County of Niagara v. State of New York, supra,* would not warrant plenary review of that same Court's contrary decision in the present case. The judgment below should, however, be summarily reversed on that ground.

In the decision below, the District Court stated the law with respect to *res judicata* as follows:

> "Under settled law three factors must be present to support a defense of res judicata or collateral estoppel: (1) there must have been a 'final judgment on the merits' in the prior action; (2) identical issues sought

> to be raised in the second action must have been decided in the prior action; and (3) the party against whom the defense is asserted must have been a party to or in privity with a party to the prior action. *Kreager v. General Electric Company,* 497 F.2d 468, 471-72 (2 Cir. 1974), quoting from *Zdanok v. Glidden Company, Durkee Famous Foods Division,* 327 F.2d 944, 955 (2 Cir.), *cert. denied,* 377 U.S. 934 (1964)."

The District Court found that the present plaintiff-appellees were not in privity with the County of Niagara in the prior action and thus declined to apply the bar of *res judicata.* However, the opening sentence of the District Court's decision in *County of Niagara v. State of New York* is: "Plaintiff, a political subdivision of the State of New York, has filed this action on behalf of its voters seeking a declaratory judgment and injunctive relief against the enforcement by defendant of Article 9(h)(1) of the New York State Constitution and Section 33(7) of the Municipal Home Rule Law of the State of New York."

The County of Niagara took the same position and sought the same relief as plaintiff-appellees do in the instant case. The precise constitutional issues raised here were raised and determined there. The plaintiff-appellees here were aware of the pendency of the Niagara County suit but made no effort to gain intervention on the ground that their rights were not being protected by the County. The present action was filed only after the judgment in the Niagara County action had become final. The present plaintiff-appellees are citizens of the County of Niagara and purport to sue in that capacity as well as on behalf of all others similarly situated. The County of Niagara represented the same constituency. For the sake of the integrity of the judicial process, this proceeding should be barred by *res judicata.*

Conclusion

This appeal raises issues of fundamental constitutional importance which have not heretofore been considered by this Court. The resolution of these sensitive issues concerning the nature of our federal system and the separation of powers is of direct and vital importance not only to the people of the State of New York, but also to the people of the United States as a whole. Plenary consideration should be had by this Court.

Respectfully submitted,

VICTOR T. FUZAK, ESQ.,
Attorney for Appellants Town of Lockport and Floyd Snyder.

May, 1975.

APPENDIX A

Decision of the United States District Court for the Western District of New York, Entered on November 22, 1974

CITIZENS FOR COMMUNITY ACTION AT the LOCAL LEVEL, INC., and Francis W. Shedd, Individually and on Behalf of all others similarly situated,
Plaintiffs,

v.

John J. GHEZZI, Secretary of State of the State of New York, *et al.*,
Defendants.

Civ. A. No. 1973-222.

United States District Court,
W. D. New York.

Nov. 22, 1974.

386 F. Supp. 1.

John J. Phelan, Buffalo, N. Y. (Moot, Sprague, Marcy, Landy, Fernbach & Smythe, Buffalo, N. Y., of counsel), for plaintiffs.

Michael G. Wolfgang, Asst. Atty. Gen., State of New York, Buffalo, N. Y. (Louis J. Lefkowitz, Atty. Gen., State of New York, New York City, of counsel), for defendants Ghezzi and Levitt.

Miles A. Lance, Asst. Niagara County Atty., Lockport, N. Y. (Samuel L. Tavano, Niagara County Atty., of counsel), for defendants Graf and Comerford.

Appendix A—Decision of the United States District Court for the Western District of New York, Entered on November 22, 1974

Before TIMBERS, Circuit Judge, and BURKE and CURTIN, District Judges.

TIMBERS, Circuit Judge:

QUESTIONS PRESENTED

On these cross motions for summary judgment in an equal suffrage suit seeking declaratory and injunctive relief with respect to Article IX, § 1(h)(1), of the Constitution of the State of New York (McKinney 1969)[1] (hereinafter, New York Constitution), and Section 33(7) of the New York Municipal Home Rule Law (McKinney Supp. 1974-75)[2]

[1] Article IX, § 1(h)(1), of the Constitution of the State of New York provides in pertinent part:

> "Counties . . . shall be empowered . . . to adopt, amend or repeal alternative forms of county government . . . . Any such form of government . . . may transfer one or more functions or duties of the county or of the cities, towns, villages, districts or other units of government wholly contained in such county to each other or when authorized by the legislature to the state, or may abolish one or more offices, departments, agencies or units of government provided, however, that no such form or amendment . . . shall become effective unless approved on a referendum by a majority of the votes cast thereon in the area of the county outside of cities, and in the cities of the county, if any, considered as one unit."

[2] Section 33(7) of the New York Municipal Home Rule Law provides in pertinent part:

> "7. A charter law
>
> (a) providing a county charter . . .
>
> (b) . . . shall conform to and be subject to consideration by the board of supervisors in accordance with the provisions of this chapter generally applicable to the form of and action on proposed local laws by the board of supervisors. If a county charter, or a charter law as described in this subdivision, is adopted by the

(Footnote continued on following page)

Appendix A—Decision of the United States District Court for the Western District of New York, Entered on November 22, 1974

(hereinafter, Home Rule Law), the following are the essential questions presented:

(1) Whether dismissal of a prior action brought in the federal court by the County of Niagara, purportedly on behalf of its citizens and voters, against the State of New York which raised substantially the same issues as are raised herein, constitutes a bar to the instant class action under the doctrine of res judicata.

(2) If not, whether creation of dual voting units of unequal population within a single political subdivision of a state, consisting of the cities of a county and the areas outside of the cities, and the concomitant requirement of separate majorities in each unit for adoption in a county-wide referendum of a county charter form of local government, so dilutes and debases the rights of the county-wide majority as to violate the one man, one vote principle.

For the reasons stated below, we hold that the instant class action is not barred by dismissal of the prior action brought by Niagara County and that the challenged dual majority requirement impairs plaintiffs' constitutional rights in the respects claimed.

Accordingly, we grant plaintiffs' motion for summary judgment and deny defendants' cross motion for summary

(Footnote continued from preceding page)

> board of supervisors, it shall not become operative unless and until it is approved at a general election or at a special election held in the county by receiving a majority of the total votes cast thereon (a) in the area of the county outside of cities and (b) in the area of the cities of the county, if any, considered as one unit. . . ."

judgment; we hold that Article IX, § 1(h)(1), of the New York Constitution, and its implementing statute, Section 33(7) of the Home Rule Law, violate the equal protection clause of the Fourteenth Amendment; and we order defendants to accept for filing, and to implement, the Niagara County Charter as approved by a majority of the popular vote in the county-wide referendum held on November 7, 1972.

PARTIES TO THE ACTION

[1] Plaintiffs are Citizens For Community Action At The Local Level, Inc. (CALL), a New York membership corporation, organized for the purpose of securing a county form of government for Niagara County; and Francis W. Shedd, a resident of the City of Niagara Falls, Niagara County, who voted in favor of the adoption of the Niagara County Charter in the November 1972 referendum. Shedd sues for himself and as representative of a class consisting of those residents of Niagara County whose votes for the County Charter allegedly were impaired by the dual referendum requirement. As individuals who allege that their vote was unconstitutionally diluted and debased, Shedd and the plaintiff class have standing to sue. Gray v. Sanders, 372 U.S. 368, 375 (1963).[3]

[3] While we find it unnecessary to reach the issue, there is some question as to whether an organization has standing to represent its members in certain cases under the Civil Rights Act, 42 U.S.C. § 1983 (1970), and its jurisdictional implementation, 28 U.S.C. § 1343 (3) (1970). E.g., Warth v. Seldin, 495 F.2d 1187, 1190-95 (2 Cir.), cert. granted, ____ U.S. ____ (1974); Aguayo v. Richardson, 473 F.2d 1090, 1098-1101 (2 Cir. 1973), cert. denied, 414 U.S. 1146 (1974).

Defendants are John J. Ghezzi, Secretary of State of the State of New York; Arthur Levitt, Comptroller of the State of New York; LaVerne S. Graf, Clerk of the Niagara County Legislature; and Kenneth Comerford, County Clerk of Niagara County, in whose office a local law must be filed in order to become effective.

JURISDICTION

[2] This court has jurisdiction over the subject matter and the parties pursuant to the Civil Rights Act, 42 U.S.C. § 1983 (1970), and its jurisdictional implementation, 28 U.S.C. § 1343(3) (1970).

[3] Since the action seeks injunctive relief with respect to provisions of a New York statute and the New York Constitution, a special statutory district court of three judges was convened to hear and determine the action pursuant to 28 U.S.C. §§ 2281 and 2284 (1970).

FACTS

The essential facts alleged in the amended complaint are admitted and may be briefly summarized.

On November 7, 1972, a proposed charter providing for local government, to be known as the Niagara County Charter, was presented to the voters of Niagara County at a county-wide referendum for adoption. Pursuant to the proposed charter, the people of Niagara County would have been entitled to vote for the offices of County Executive and Comptroller. Moreover, the unit of local government provided for in the proposed charter would have had general governmental powers and would have performed sub-

stantial governmental functions, including establishment of a tax rate, equalization of assessments, issuance of bonds, maintenance of county property and roads, and the administration of health and public welfare services.

Although a majority of the county-wide vote favored adoption of the charter form of local government, the separate majority of voters in the areas of Niagara County outside of the cities voted against adoption.[4] Accordingly, the proposed charter was not accepted for filing and ultimate implementation by defendants because of non-compliance with the dual majority requirement of § 33(7) of the Home Rule Laws.

On December 18, 1972, the County of Niagara, purporting to represent its "citizens and voters", commenced an action in the district court, seeking, inter alia, a declaration that Article IX, § 1(h)(1), of the New York Constitution, and § 33(7) of the Home Rule Law were unconstitutional as violative of the one man, one vote principle. That action was dismissed on the merits by Judge Henderson. County of Niagara, New York v. State of New York, Civil 1972-656 (filed April 3, 1973)[5] (hereinafter, *County of Niagara*). On May 4, 1973, plaintiffs commenced the instant action seeking essentially the same relief.

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[4] The vote on the proposed charter was as follows:

	For	*Against*
Cities	18,220	14,914
Areas outside of cities	10,665	11,594
Total	28,885	26,508

The electors of the County approved the charter by a county-wide plurality of 2375 votes.

[5] The County did not appeal from the judgment of dismissal despite the request by plaintiff Shedd that it do so.

CLAIMS OF THE PARTIES

Plaintiffs' essential claim is that Article IX, § 1(h)(1), and § 33(7) deny them equal protection of the laws because they violate the one man, one vote principle. In support of this claim, plaintiffs point out that, pursuant to the challenged provisions, Niagara County is partitioned into two separate voting units of unequal population, one consisting of the cities within Niagara County and the other consisting of the areas of the county outside of the cities; and that the challenged provisions require a majority vote in each unit, regardless of the total popular vote, for adoption in a county-wide referendum of a county charter form of government having general governmental powers.

Accordingly, plaintiffs demand a declaratory judgment (1) that the challenged constitutional and statutory provisions deny them equal protection of the laws in violation of the Fourteenth Amendment; (2) that the Niagara County Charter was duly adopted by a majority affirmative vote in the county-wide referendum held on November 7, 1972; and (3) that the Charter is in full force and effect as the instrument defining the form of local government for Niagara County. In addition, plaintiffs demand an injunction (1) directing defendants to file and implement the Niagara County Charter as adopted; and (2) directing that an election for the offices of County Executive and Comptroller as provided in the charter be held forthwith.

Defendants' position is twofold. They assert, first, that the instant action is barred by dismissal of the prior action brought by the County of Niagara purportedly on

behalf of citizens and voters raising substantially the same issues. Second, with respect to the merits of plaintiff's constitutional claims, defendants assert (1) that, in adopting constitutional and statutory provisions which prescribed procedures to be followed by a county in adopting a new form of government, the State of New York was exercising sovereign powers solely within the domain of state interests and therefore such provisions are insulated from judicial scrutiny; and (2) that a county-wide referendum for the adoption of a form of local government having general governmental powers, as opposed to an election of representatives in such a governmental structure, need not comply with the one man, one vote principle.

The claims of the respective parties are before us on cross motions for summary judgment.

DEFENDANTS' RES JUDICATA DEFENSE

Before reaching the merits of plaintiffs' constitutional claim, our threshold inquiry must be directed to the question of whether plaintiffs in the instant action are barred from relitigating issues considered and rejected by the district court in the prior action, County of Niagara, New York v. State of New York, *supra*.

[4] Under settled law three factors must be present to support a defense of res judicata or collateral estoppel: (1) there must have been a "final judgment on the merits" in the prior action; (2) identical issues sought to be raised in the second action must have been decided in the prior action; and (3) the party against whom the defense is

asserted must have been a party to or in privity with a party to the prior action. Kreager v. General Electric Company, 497 F.2d 468, 471 (2 Cir. 1974), quoting from Zdanok v. Glidden Company, Durkee Famous Foods Division, 327 F.2d 944, 955 (2 Cir.), cert. denied, 377 U.S. 934 (1964).

In the instant action, the first two factors stated above are conceded by plaintiffs. There was a final judgment on the merits in *County of Niagara* and the constitutional issues raised and decided there are essentially identical to those presented here.

As for the third requirement of *Kreager*, we hold that the private citizens who are members of the plaintiff class in the instant action are not bound by the judgment in the prior action purportedly brought on their behalf, since they were not formal parties to that action and there is no basis upon which to hold them in privity with Niagara County. See Williamson v. Bethlehem Steel Corp., 468 F. 2d 1201, 1203-04 (2 Cir. 1972), cert. denied, 411 U.S. 931 (1973); 1B Moore, Federal Practice ¶ 0.411 [1] (2d ed. 1974).

[5, 6] Absent statutory or contractual authority, a person ordinarily cannot be bound without his consent by a judgment in a prior action to which he was not a party simply because a party to that litigation purported to represent all individuals who share an interest in the subject matter of the action. Dudley v. Meyers, 422 F.2d 1389, 1393-94 (3 Cir. 1970); 1B Moore, *supra*, ¶ 0.411 [1], at 1253, and ¶ 0.411[3], at 1423. Cf. Kersh Lake Drainage

District v. Johnson, 309 U.S. 485 (1940); United States v. Kabinto, 456 F.2d 1087 (9 Cir.), cert. denied, 409 U.S. 842 (1972). Here there is no claim either that the County of Niagara was authorized to seek vindication of the constitutional rights of its "citizens and voters" or that any member of the present plaintiff class consented to being represented in the prior action by the County.[6]

Defendants argue, however, that we must look through form to substance and they urge us to characterize *County of Niagara* as a class action. If that were a true class action, and assuming appropriate notice, cf. Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 172-77 (1974), vacating 479 F.2d 1005 (2 Cir. 1973), and adequate representation, e. g., Hansberry v. Lee, 311 U.S. 32 (1940), the prior judgment would be binding on the plaintiffs here. The short answer to defendants' claim, however, is that *County of Niagara* was not brought pursuant to Fed.R.Civ.P. 23. Thus, the district court in the prior action was not called upon to make such critical initial determinations under Rule 23 as to whether the County could or would "fairly and adequately protect the interests of the class" claimed by defendants to have been represented. Fed.R.Civ.P. 23(a)(4). Nor was the court afforded the opportunity to consider the desirability or necessity of formulating provisions for notice to members of the class, Fed.R.Civ.P. 23(d)(2); cf. Eisen v. Carlisle & Jacquelin, *supra*, or to deal with similar procedural matters. Fed.R.Civ.P. 23(d)(5).

[6] Indeed, it is not at all clear that the County of Niagara had standing to represent the interests of its citizens and voters in the prior action. Note 3 *supra*.

In short, we hold that (1) because the plaintiffs here were not parties to *County of Niagara*, (2) because the County had no valid authority to sue on behalf of its citizens and voters, and (3) because the prior action was not a proper class action brought pursuant to Rule 23, the third requirement of *Kreager* has not been satisfied. Defendants' defense of res judicata must fail.

PLAINTIFFS' CONSTITUTIONAL CLAIM

The gravamen of plaintiffs' complaint is that, by partitioning Niagara County into two separate voting units of unequal population consisting of the urban areas of the county on one hand and the rural areas on the other, and by requiring separate majorities in each for the adoption of a county charter form of local government having general governmental powers, Article IX, § 1(h)(1), and its statutory implementation, § 33(7), create arbitrary and irrational classifications based solely upon residence which result in a constitutionally impermissible voting pattern.

Defendants, on the other hand, claim that, since counties are no more than subordinate governmental instrumentalities which are created by the state and which hold and exercise power subject to its sovereign will, their internal governmental structure and the procedure for adopting it are not subject to federal judicial scrutiny. In the alternative, they contend that the one man, one vote principle does not apply to the selection of a form of government.

The precise issue here presented appears to be one of first impression.[7] The Supreme Court, however, repeatedly has ruled on the scope and meaning of the one man, one vote principle in numerous decisions since the seminal case of Baker v. Carr, 369 U.S. 186 (1962). Reasoning by analogy from those cases, we hold that the dual majority requirement of Article IX, § 1(h)(1), of the New York Constitution and § 33(7) of the Home Rule Law is not insulated from judicial scrutiny and is unconstitutional because it violates the one man, one vote principle.

[7, 8] Defendants' claim that the challenged state procedure for adopting new forms of local government is immune from judicial scrutiny is wholly without merit. We recognize the sovereign right of a state to create political subdivisions to assist it in carrying out state governmental functions. From this it does not follow, however, merely because subordinate governmental instrumentalities exist subject to the state's sovereign will, that a state may exercise that will so as to impair constitutionally protected rights of its citizens. As the Supreme Court stated in Gomillion v. Lightfoot, 364 U.S. 339, 347-48 (1960):

> "When a State exercises power wholly within the domain of state interest, it is insulated from federal judicial review. But such insulation is not carried over when state power is used as an instrument for circumventing a federally protected right. This principle has had many applications. It has long been recognized in cases which have prohibited a State from exploiting a power acknowledged to be absolute in an isolated context to justify the imposition of an 'unconstitutional condition.' What the Court has said in those cases is equally applicable here, viz., that 'Acts generally lawful may become unlawful when done to accomplish an unlawful end. United States v. Reading Co., 226 U.S. 324, 357, and a constitutional power cannot be used by way of condition to attain an unconstitutional result.' Western Union Telegraph Co. v. Foster, 247 U.S. 105, 114."

[7] With the exception, of course, of *County of Niagara*, the prior action.

Applying the principle of *Gomillion* in Gray v. Sanders, *supra*, the Supreme Court held that, although the State of Georgia was under no obligation to adopt a state primary procedure for the nomination of a candidate for federal and statewide officers, once it has done so the state was required to give "all who participat[ed] in the election . . . an equal vote . . ." 372 U.S. at 379. Similarly, in Avery v. Midland County, 390 U.S. 474, 480 (1968), the Court held that:

> "[W]hen the State delegates law-making power to local government and provides for the election of local officials . . ., it must insure that those qualified to vote have the right to an equally effective voice in the election process."

[9] The State of New York, having chosen to create subordinate units of government, is not immune from judicial scrutiny when confronted with a claim that its exercise of sovereign power results in the imposition of unconstitutional conditions upon the voters of that political subdivision.

We turn next to the question whether the one man, one vote principle of Reynolds v. Sims, 377 U.S. 533 (1964), and its progeny, has been violated by the dual majority

requirement which, as here applied, has had the effect of diluting the votes of the city dwellers of Niagara County by permitting the minority rural voters to veto the adoption of the proposed charter.

Defendants concede that the requirements of Article IX, § 1(h)(1), and § 33(7) would violate that principle if applied to an election of representatives. They seek to distinguish the *Gray-Reynolds-Avery* line of cases, however, on the ground that they did not involve the selection by popular vote of a form of government. They argue further that the more recent decisions of the Supreme Court in Salyer Land Co. v. Tulare Water District, 410 U.S. 719 (1973), and Gordon v. Lance, 403 U.S. 1 (1971), portend a willingness on the part of the Court to sanction greater flexibility in the one man, one vote principle. They say that the dual majority requirement here challenged would pass muster under those recent decisions. We disagree.

[10, 11] The fact that the referendum here in question did not involve election of representatives is not fatal to plaintiffs' complaint. The Supreme Court has applied the one man, one vote principle to non-representational referenda. City of Phoenix v. Kolodziejski, 399 U.S. 204 (1970) (general obligation bonds); Gordon v. Lance, *supra* (municipal bonds and tax rates); Cipriano v. City of Houma, 395 U.S. 701 (1969) (municipal utility revenue bonds). Nor are we persuaded by defendants' tenuous argument that the principle is inapplicable here because the challenged referendum involved not the incurring of debt

but the adoption of a form of local government. Defendants have suggested no reason grounded on precedent or policy why such a referendum, which would have created the elective offices of County Executive and Comptroller need not conform to the one man, one vote principle, while the direct election of those officials would have been required to conform. E.g., Hadley v. Junior College District, 397 U.S. 50 (1970); Avery v. Midland County, *supra*. We find no merit in the suggested distinction.

Defendants place heavy reliance on what they claim is the new flexibility of the one man, one vote principle as reflected in the decisions of the Supreme Court in Salyer Land Co. v. Tulare Water District, *supra*, and Gordon v. Lance, *supra*. We think such reliance, in the context of the instant case, is misplaced.

In *Salyer* the Supreme Court upheld California statutes which limited the franchise with respect to the management of local water storage and flood control units to land owners of the district "by reason of its special limited purpose and of the disproportionate effect of its activities on landowners as a group . . ." 410 U.S. at 728. Unlike the situation in *Salyer*, the functions which were to have been performed by the county government provided for in the proposed Niagara County Charter were of a general governmental nature. Such governmental functions clearly would have affected all residents of Niagara County. If *Salyer* is relevant at all, it would seem to support plaintiffs' position.

Defendants place their greatest reliance on *Gordon*. There the Supreme Court upheld West Virginia's constitutional and statutory requirement that political subdivisions not incur bonded indebtedness or raise tax rates beyond a stated maximum unless the proposals are approved by 60% of the popular vote. The rationale of *Gordon* is that a state has the right to protect minority interests and those of unborn generations, in certain substantive areas, by requiring a greater than majority vote.

Reasoning by analogy from *Gordon*, defendants argue that, because of the potential long-range, untold consequences of a referendum such as that here involved, the state was justified in placing the responsibility for such a fundamental change as that affecting the form of government in the hands of a super-majority. They argue further that, since each of the separate voting units within Niagara County might have vetoed the adoption of the charter, the dual majority requirement did not "authorize discrimination against any identifiable class", Gordon, *supra*, 403 U.S. at 7, and therefore did not violate the Fourteenth Amendment.

At first blush, this argument would appear to have merit. Upon more careful analysis, however, we find *Gordon* to be distinguishable in these material respects:

> First, the dual majority requirement does not provide, as defendants suggest, for a simple super-majority vote. Under Article IX, § 1(h)(1), and § 33(7), there is no limit whatever to the minority domination and to the dilution of the majority vote. The Supreme Court specifically declined to consider the constitutionality of such unlimited minority veto. *Gordon, supra*, 403 U.S. at 8 n. 6.

> Second, unlike the situation in *Gordon*, the dual majority requirement, as here applied, indeed did discriminate against, and did dilute and debase the vote of, an identifiable group, i.e. the city dwellers of Niagara County.
>
> Third, the Court in *Gordon* reaffirmed, without qualification, its holdings in prior cases where an impermissible "dilution of voting power [was found] because of group characteristics—geographic location . . .—that bore no valid relation to the interest of those groups in the subject matter of the election . . ." 403 U.S. at 4. See Cipriano v. City of Houma, *supra*; Gray v. Sanders, *supra*.

[12] We hold that defendants in the instant case have failed to sustain their heavy burden of demonstrating that the urban-rural voter unit classification imposed by Article IX, § 1(h)(1), and § 33(7), bears any relationship to, or is in any way justified by, the interests of each group in the creation of a county-wide governmental structure.

The Clerk will enter judgment for plaintiffs in accordance with this opinion. No costs.

APPENDIX B

Declaratory Judgment and Injunction

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF NEW YORK

CITIZENS FOR COMMUNITY ACTION AT THE LOCAL LEVEL, INC. and FRANCIS W. SHEDD, Individually and on Behalf of All Others Similarly Situated,
Plaintiffs,

vs.

JOHN J. GHEZZI, Secretary of State of the State of New York, ARTHUR LEVITT, Comptroller of the State of New York, LaVERNE S. GRAF, Clerk of the County Legislature, County of Niagara, New York and KENNETH COMERFORD, County Clerk, County of Niagara, New York,

Defendants.

Civil Action No. 1973-222.

This cause came on to be heard, before a statutory three judge district court convened pursuant to 28 U.S.C. §§ 2281 and 2284 (1970) consisting of The Honorable William H. Timbers, Judge of the United States Court of Appeals for the Second Circuit and The Honorable Harold P. Burke and The Honorable John T. Curtin, Judges of the United States District Court for the Western District of New York, upon cross motions for summary judgment in an equal suffrage suit seeking declaratory and injunctive relief with respect to Article IX, § 1 (h) (1) of the Constitution of the State of New York and § 33 (7) of the New York Municipal

Home Rule Law and the court having considered the issues and an opinion having been filed on the 22nd day of November, 1974 written by The Honorable William H. Timbers, U.S.C.J. in which The Honorable Harold J. Burke, U.S.D.J. and The Honorable John T. Curtin, U.S.D.J. concurred,

NOW upon the complaint in the action and upon the answers of each of the defendants and upon the cross motions for summary judgment and oral argument having been heard by the special statutory district court on the 20th day of June, 1974, at the United States Court House in Buffalo, New York, at which time the plaintiffs were represented by John J. Phelan, of counsel for the firm of Moot, Sprague, Marcy, Landy, Fernbach & Smythe of Buffalo, New York and the defendants John J. Ghezzi, Secretary of State of the State of New York and Arthur Levitt, Comptroller of the State of New York were represented by Louis J. Lefkowitz, Attorney General of the State of New York, Michael G. Wolfgang, Assistant Attorney General, of counsel and the defendants LaVerne S. Graf, Clerk of the Niagara County Legislature and Kenneth Comerford, County Clerk of Niagara County were represented by Samuel L. Tavano, County Attorney, County of Niagara, Miles A. Lance, Assistant County Attorney of counsel, and due deliberation having been had, it is therefore

ORDERED that the motion of the plaintiffs for summary judgment be and it hereby is granted and the motion of the defendants for summary judgment be and it hereby is denied and further, it is hereby

Appendix B—Declaratory Judgment and Injunction

ADJUDGED and decreed that:

1. Article IX § 1 (h) (1) of the Constitution of the State of New York and § 33 (7) of the Municipal Home Rule of the State of New York [35c McKinney's Consolidated Laws of New York, § 33 (7)] are unconstitutional in violation of the guarantee of equal suffrage contained in the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution and

2. The application of Article IX § 1 (h) (1) of the New York State Constitution and § 33 (7) of the Municipal Home Rule Law of the State of New York [35c McKinney's Consolidated Laws of New York] to the vote upon a referendum for a Niagara County Charter in the 1972 general election has denied the plaintiffs the equal protection of the laws in violation of the Fourteenth Amendment of the United States Constitution and

3. The Niagara County Charter was duly adopted by a majority affirmative vote in the countywide referendum held on November 7, 1972 and

4. The county charter contained in Niagara County Local Law No. 1 of 1972 is in full force and effect as the instrument defining the form of local government for Niagara County and it is further

ADJUDGED and decreed that the defendants are enjoined and directed to file and implement the Niagara County Charter set forth in Local Law No. 1 of 1972 for Niagara County which local law was the subject of a countywide referendum in Niagara County on November 7, 1972

Appendix B—Declaratory Judgment and Injunction

and which local law was approved by a majority of the popular vote in such election.

WM. H. TIMBERS
WILLIAM H. TIMBERS
United States Circuit Judge

HAROLD P. BURKE
HAROLD P. BURKE
United States District Judge

JOHN T. CURTIN
JOHN T. CURTIN
United States District Judge

Dated: January 9, 1975.

APPENDIX C

Notice of Appeal to the Supreme Court of the United States

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF NEW YORK

CITIZENS FOR COMMUNITY ACTION AT THE LOCAL LEVEL, INC. and FRANCIS W. SHEDD, Individually and on Behalf of All Others Similarly Situated,
Plaintiffs,

vs.

JOHN J. GHEZZI, Secretary of State of the State of New York, ARTHUR LEVITT, Comptroller of the State of New York, LAVERNE S. GRAF, Clerk of the County Legislature, County of Niagara, New York and KENNETH COMERFORD, County Clerk, County of Niagara, New York,
Defendants,

and

THE TOWN OF LOCKPORT, New York, and FLOYD SNYDER, Individually and as Supervisor of The Town of Lockport,
Intervening Defendants.

Civil Action No. 1973-222.

Notice is hereby given that The Town of Lockport, New York, and Floyd Snyder, individually and as Supervisor of The Town of Lockport, the Intervening Defendants above named, hereby appeal to the Supreme Court of the United States from each and every part of the final judgment entered in this action on January 9, 1975 declaring Article IX Section 1(h)(1) of the Constitution of the State of New

Appendix C—Notice of Appeal to the Supreme Court of the United States

York and Section 33(7) of the Municipal Home Rule Law of the State of New York [Volume 35 c McKinney's Consolidated Laws of New York, Section 33(7)] unconstitutional as being in violation of the guarantee of equal suffrage contained in the equal protection clause of the Fourteenth Amendment to the United States Constitution, declaring a proposed Charter for Niagara County to be duly adopted, and enjoining and directing the above-named defendants to file and implement the Niagara County Charter set forth in Local Law No. 1 of 1972 for Niagara County.

This appeal is taken pursuant to 28 U.S.C.A. Section 1253.

Dated: Buffalo, New York, March 6, 1975.

VICTOR T. FUZAK
VICTOR T. FUZAK, ESQ.

for

HODGSON, RUSS, ANDREWS, WOODS & GOODYEAR
1800 One M & T Plaza
Buffalo, New York 14203
Telephone: 856-4000

and

ANDREWS, PUSATERI, BRANDT, SHOEMAKER, HIGGINS & ROBERSON

Attorneys for Intervening Defendants

APPENDIX D

Decision, April 3, 1973, District Court of the Western District of New York, *County of Niagara v. State of New York* (Civil 1972—656)

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF NEW YORK

COUNTY OF NIAGARA, NEW YORK,

Plaintiff,

vs.

STATE OF NEW YORK,

Defendant.

Civil 1972-656

Appearances:

Samuel L. Tavano, Niagara County Attorney (Miles A. Lance, Assistant County Attorney, of Counsel), Lockport, New York, for Plaintiff.

Louis J. Lefkowitz, Attorney General of the State of New York, (William J. Kogan, Assistant Attorney General, of Counsel), Albany, New York, for Defendant.

Plaintiff, a political subdivision of the State of New York, has filed this action on behalf of its voters seeking a declaratory judgment and injunctive relief against the enforcement by defendant of Article 9 (h) (1) of the New York State Constitution and section 33 (7) of the Municipal

Appendix D—Decision, April 3, 1973, District Court of the Western District of New York, County of Niagara v. State of New York (Civil 1972—656)

Home Rule Law of the State of New York. Because the claim directs a constitutional attack upon a state constitutional provision and a state statute plaintiff also asks that a three judge court be convened, pursuant to 28 United States Code, section 2281. Defendant has moved to dismiss the complaint.

This case arose out of a referendum held at the November 7, 1972 elections in which a proposed new county charter was presented to the voters of Niagara County. The proposed charter would amend the present form of government in Niagara County by creating the offices of county executive and county controller, and by extending the term of office of county legislators from two to four years. Although the county-wide vote resulted in a majority in favor of adoption of the proposed charter, the vote in the areas outside the cities, when taken as a unit, resulted in a majority against the adoption of the proposed charter.

In December, 1972 the new charter was presented to The Secretary of State of the State of New York for filing. The Secretary of State refused to file the new charter because County of Niagara officials could not certify that it had been passed by a majority vote both in the cities of the county and in the area outside the cities, each considered as an independent unit. This action was taken by the Secretary of State pursuant to section 33 of the Municipal Home Rule Law, Subdivision 7, which provides as follows:

> 7. A charter law
>
> (a) providing a county charter, or

(b) proposing an amendment or repeal of one or more provisons thereof which would have the effect of transferring a function or duty of the county, or of a city, town, village, district or other unit of local government wholly contained in the county, shall conform to and be subject to consideration by the board of supervisors in accordance with the provisions of this chapter . . . . If a county charter, or a charter law as described in this subdivision, is adopted by the board of supervisors, it shall not become operative unless and until it is approved at a general election or at a special election, held in the county by receiving a majority of the total votes cast thereon (a) in the area of the county outside of cities and (b) in the area of the cities of the county, if any, considered as one unit . . . .

This statute was enacted pursuant to Article 9, Section 1, subdivision (h) (1) of the New York State Constitution, which provides:

"(h)(1) Counties, . . . shall be empowered . . . to adopt, amend or repeal alternative forms of county government. . . . Any such form of government . . . may transfer one or more functions or duties of the county or of the cities, towns, villages, districts or other units of government wholly contained in such county to each other or when authorized by the legislature to the state, or may abolish one or more offices, departments, agencies or units of government provided, however, that no such form or amendment . . . shall become effective unless approved on a referendum by a majority of the votes cast thereon in the area of the county outside of cities, and in the cities of the county, if any, considered as one unit."

Plaintiff contends (1) that section 33 (7) of the Municipal Home Rule Law was enacted in violation of Article 9 (h) (1) of the New York State Constitution, since the state

constitution did not contemplate that separate majorities would be required to adopt a new charter that did not provide for a transfer of functions to or from the county or the cities or the towns; (2) that even if the state constitution is construed to permit such legislation, both the state constitutional provision and the section of the Municipal Home Rule Law in question violate the due process and equal protection clauses of the United States Constitution, as interpreted by the Supreme Court in *Baker v. Carr*, 369 U.S. 186, and subsequent cases; (3) even if both the state constitutional provision and the state statute are held to be constitutional, the proper construction of section 33(7) of the Municipal Home Rule Law is that separate majorities in cities and areas outside the cities are required only if functions or duties are transferred to or from those entities to the county by provisions of the proposed charter.

With regard to plaintiff's second claim, it is true that in *Baker v. Carr, Id.*, and in subsequent cases the Supreme Court set forth the principle that in statewide and congressional elections, one person's vote must be counted equally with those of all other voters in a state. See, *Gray v. Sanders*, 372 U.S. 368; *Wesberry v. Sanders*, 376 U.S. 1; *Reynolds v. Sims*, 377 U.S. 533. However, the one man one vote concept is not without its limits. In *Wells. v. Edwards*, 41 U.S.L.W. 3370 (U.S. Jan 9, 1973) the court refused to apply the concept of one man one vote to the establishment of districts for the election of judges.

This case deals with a referendum held for the purpose of obtaining voter approval of a new form of county government. A county, being a political subdivision of a state,

Appendix D—Decision, April 3, 1973, District Court of the Western District of New York, County of Niagara v. State of New York (Civil 1972—656)

is, in a sense, a creature of that state. *cf. Trenton v. New Jersey*, 262 U.S. 182. The State of New York has adopted a constitutional provision allowing counties within the state to create alternate forms of government. The New York State legislature has acted to implement that state constitutional provisions by enacting the Municipal Home Rule Law, which further spells out the procedures to be followed by a county in adopting a new form of government. The State of New York was acting within its sovereign power in adopting the constitutional and statutory provisions referred to above. Where a state exercises power wholly within the domain of state interest, it is insulated from federal judicial review. *Gomillion v. Lightfoot*, 364 U.S. 339, 347 (1960).

Title 28, United States Code section 2281 does not require the convening of a three judge court when the constitutional attack upon a state statute is insubstantial. *Bailey v. Patterson*, 369 U.S. 31; *Goosby v. Osser*, 41 U.S. L.W. 4167 (U.S. Jan. 17, 1973). The facts presented by this case do not raise a substantial federal question.

In light of the foregoing, this court does not reach the other contentions of the Plaintiff. Plaintiff's motion to convene a three-judge court is denied. The motion of Defendant to dismiss is granted.

It is so ordered.

JOHN O. HENDERSON
United States District Judge

Dated: April 3, 1973.

APPENDIX E

Section 33-a Municipal Home Rule Law of New York

§ 33a. Transfer of Functions or Duties of Local Governments and Districts

1. Subject to restrictions in the constitution, in this article or in any other applicable law, the board of supervisors of any county may, by local law, transfer functions or duties of the county or of the cities, towns, villages, districts or other units of government wholly contained in such county to each other, or for the abolition of one or more offices, departments or agencies of such units of government when all their functions or duties are so transferred.

2. Any such local law, or an amendment or repeal of one or more provisions thereof which would have the effect of transferring a function or duty of the county or of the cities, towns, villages, districts or other units of government wholly contained in the county, shall not become operative unless and until it is approved at a general election or at a special election, held in the county by receiving a majority of the total votes cast thereon: (a) in the area of the county outside of cities and (b) in the area of cities of the county, if any, considered as one unit, and if it provides for the transfer of any function or duty to or from any village or for the abolition of any office, department, agency or unit of government of a village wholly contained in the county, it shall not take effect unless it shall also receive a majority of all the votes cast thereon in all the villages so affected considered as one unit. Such a local law, amendment or repeal thereof, shall provide for its submission to the electors of the county at the next general election or at a special election, occurring not less than sixty days after the adoption thereof by the board of supervisors.

Supreme Court, U. S.
FILED
MAY 29 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1975

No. 74-1390

TOWN OF LOCKPORT, NEW YORK, and FLOYD SNYDER, Individually and as Supervisor of the Town of Lockport,
Appellants,

vs.

CITIZENS FOR COMMUNITY ACTION AT THE LOCAL LEVEL, INC. and FRANCIS W. SHEDD, Individually and on Behalf of All Others Similarly Situated,
Appellees,

and

JOHN J. GHEZZI, Secretary of State of the State of New York, ARTHUR LEVITT, Comptroller of the State of New York, LAVERNE S. GRAF, Clerk of the County Legislature, County of Niagara, New York and KENNETH COMERFORD, County Clerk, County of Niagara, New York,
Appellees.

APPEAL FROM A THREE JUDGE COURT OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NEW YORK.

REPLY TO JURISDICTIONAL STATEMENT

SAMUEL L. TAVANO, ESQ.,
Niagara County Attorney,
Niagara County Court House,
Lockport, New York 14094,

MILES A. LANCE, ESQ., *of counsel,*
Assistant Niagara County Attorney,
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Lockport, New York 14904,

Attorneys for Appellees: LaVerne S. Graf and Kenneth Comerford.

May, 1975.

BATAVIA TIMES, APPELLATE COURT PRINTERS
A. GERALD KLEPS, REPRESENTATIVE
BATAVIA, N. Y. 14020
716-343-0457

INDEX.

PAGE

I. The Appellees, Comerford and Graf deny that there has been any type of "change the rules after the game" as argued on Page "6" of the Jurisdictional Statement 1

II. The 1972 charter in question does not transfer any existing government functions or prerogatives or powers in contradiction to Appellants' contention ... 2

III. The question before the Court in regard to the 1972 charter is now moot 4

STATUTE.

Section 33, subd. (7) of the Municipal Home Rule Law and the New York Constitution 3

IN THE

Supreme Court of the United States

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Appellants,

vs.

CITIZENS FOR COMMUNITY ACTION AT THE LOCAL LEVEL, INC. and FRANCIS W. SHEDD, Individually and on Behalf of All Others Similarly Situated,

Appellees,

and

JOHN J. GHEZZI, Secretary of State of the State of New York, ARTHUR LEVITT, Comptroller of the State of New York, LaVERNE S. GRAF, Clerk of the County Legislature, County of Niagara, New York and KENNETH COMERFORD, County Clerk, County of Niagara, New York,

Appellees.

REPLY TO JURISDICTIONAL STATEMENT

I

The Appellees, Comerford and Graf deny that there has been any type of "change the rules after the game" as argued on Page "6" of the Jurisdictional Statement.

The District Court said merely that a majority of the voters of the whole electorate were the proper persons to adopt a Niagara County Charter and there is no question

but that the vote was sufficient. The assumption of Appellants that voters were casting votes in reliance on the premise that a dual majority was required is completely unfounded. It is unlikely that any voter cast a vote because of the voting requirements. If anything, advance knowledge of the fact that a single majority vote only was required would logically have tended to produce a greater margin of victory for the charter, since the affirmative votes came mainly from the most populous area and negative votes from the less populous areas.

II

The 1972 charter in question does not transfer any existing government functions or prerogatives or powers in contradiction to Appellants' contention.

It is stated on Page 20, paragraph 3 of the Jurisdictional Statement as follows:

> "The proposed Niagara County Charter involves major modifications in political approach. It would effect the realignment and transference of existing government functions and prerogatives among and from local government units to the proposed county government unit."

The quoted statement is untrue even though within the allegations of the amended complaint. Judge John O. Henderson allowed an amended complaint to be served in the above action, deleting the following statement from the original complaint:

> "By the terms of the proposed county charter, no function, facility, duty or power of any city, town, village or district is transferred, altered or impaired."

The allowance of an amended complaint by Judge John O. Henderson was not proper since, in fact, the 1972 charter did not disturb any function, facility, duty or power of any city, town, village or district, as a brief reading of the charter would indicate (See Sec. 2201 of the 1972 charter), as follows:

> "Section 2201. *Local Government Functions, Facilities & Powers Not Transferred, Altered or Impaired.* No function, facility, duty or power of any city, town, village, school district or other district or of any officer thereof is or shall be transferred, altered or impaired by this charter or code."

The amended complaint is much broader than the original complaint and is not consistent with the established facts upon which the lawsuit was founded.

Under the New York State Constitution and Section 33, subd. (7) of the Municipal Home Rule Law of the State of New York, the interpretation of the State of New York was that a double referendum was required for any county charter, while the interpretation of the County of Niagara was that a double referendum was required only if there was a transfer of functions, powers, duties or similar prerogatives from one local governmental unit to the other. Under the amended complaint, the United States Supreme Court is being asked to invalidate Section 33, subd. (7) of the Municipal Home Rule Law and the New York Constitution in regard to double referendums, under a complaint drawn so broadly that the whole section would be invalidated without regard to whether or not there was a transfer of functions, powers and duties, or whether the charter under consideration affected only county government administration in the narrow sense of day to day functioning.

These appellees contend that the 1972 charter before the Court transferred no functions, powers or duties and therefore, a simple majority vote was enough to enact it into law. It is also believed that if, in fact, a charter were to transfer functions, powers or duties, then the double referendum might be valid.

If the United States Supreme Court should decide this case based upon the amended complaint, it would be, in effect, deciding a question not properly before the Court because it is not premised on facts in existence. The United States Supreme Court in such an instance would be deciding a hypothetical or advisory matter which is being presented to the Court. It is believed that the reason that the complaint was amended in this fashion by the Appellants is because there was no reasonable possibility of getting the removal of the double referendum requirement by political means within the framework of the New York State Constitution and State statutes.

III

The question before the Court in regard to the 1972 charter is now moot.

On November 5, 1974, the majority of the voters of the County of Niagara adopted a charter for the County of Niagara different than the 1972 charter, which is the subject of this lawsuit. This charter was duly accepted by the Secretary of State of the State of New York for filing on February 28, 1975.

The 1974 charter supplanted and superseded the 1972 charter with the following language in Section 101:

> "Section 101. *Title and Purpose.* This charter together with any and all amendments hereto, if any, shall provide for and constitute the form of government for Niagara County, and shall supersede any and all other forms of government for the County of Niagara, including any charter previously adopted, and shall be known and may be cited as the 'Niagara County Charter'. . . ."

Therefore, for the United States Supreme Court to decide this action involving the charter enacted in 1972 would be a mere theoretical exercise having no legal consequence.

Respectfully submitted,

SAMUEL L. TAVANO, Esq.,
MILES A. LANCE, *of counsel,*
Attorneys for Appellees,
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Lockport, New York 14094.

Supreme Court, U. S.
FILED
JUN 2 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1974

No. 74-1390

TOWN OF LOCKPORT, NEW YORK, and FLOYD SNYDER, Individually and as Supervisor of the Town of Lockport,
Appellants,

vs.

CITIZENS FOR COMMUNITY ACTION AT THE LOCAL LEVEL, INC. and FRANCIS W. SHEDD, Individually and on Behalf of All Others Similarly Situated,
Appellees,

and

JOHN J. GHEZZI, Secretary of State of the State of New York, ARTHUR LEVITT, Comptroller of the State of New York, LAVERNE S. GRAF, Clerk of the County Legislature, County of Niagara, New York and KENNETH COMERFORD, County Clerk, County of Niagara, New York,
Appellees.

APPEAL FROM A THREE JUDGE COURT OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NEW YORK.

MOTION TO AFFIRM
AND
BRIEF OF APPELLEES, CITIZENS FOR COMMUNITY ACTION AT THE LOCAL LEVEL, INC. AND FRANCIS W. SHEDD, Individually and on Behalf of All Others Similarly Situated

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and
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Buffalo, New York,
for
MOOT, SPRAGUE, MARCY, LANDY, FERNBACH & SMYTHE,
Buffalo, New York,
Attorneys for Appellees, Citizens for Community Action at the Local Level, Inc. and Francis W. Shedd, Individually and on Behalf of All Others Similarly Situated.

BATAVIA TIMES, APPELLATE COURT PRINTERS
A. GERALD KLEPS, REPRESENTATIVE
BATAVIA, N. Y. 14020
716-343-0457

INDEX.

PAGE

Opinion Below 2

Jurisdiction 2

Constitutional and Statutory Provisions Involved 2

Questions Presented 2

Statement of Case 3

Although the Precise Issue Herein May Not Have Been Previously Decided, the Decision of the Three-Judge District Court Adopts Established Law and Should be Affirmed Without Plenary Consideration 5

I The contention of the appellant that the right of the states to establish the form and structure of subordinate governments is not subject to the Fourteenth Amendment is not a correct statement of established law 5

II The secondary argument of the appellant that the one man—one vote principle does not apply to an election to determine the form or structure of a unit of local government with general governmental power is inconsistent with the line of cases on the subject in this Court 6

III The state's classification of voters based upon their residence, a suspect classification, required that such classification meet the compelling state interest test. No evidence of the necessity or justification for the classification is offered in this case 6

IV The concluding argument of the appellant, and really his only available argument, is that the classification of voters into city voters and town voters is a justifiable exercise of state action. Such classification is constitutionally defective 7

PAGE

V The decision by the Court below that in the prior action Niagara County was not representing the class of aggrieved voters who bring this action is amply supported. However, the contention by the appellant that the aggrieved voters made no effort to preserve the original action is incorrect 9

Conclusion 10

Appendix A—Portion of Abstract of Proposed Charter for Niagara County 11

TABLE OF CASES.

Avery vs. Midland County, Texas, 390 U.S. 474, 88 S.Ct. 1114 (1968) 6
Cipriano vs. Houma, 395 U.S. 701, 89 S.Ct. 1897 (1969) 6
City of Phoenix vs. Kolodziejski, 399 U.S. 204, 90 S. Ct. 1990 (1970) 6
Gomillion vs. Lightfoot, 364 U.S. 339, 81 S.Ct. 125 (1960) 5
Gordon vs. Lance, 403 U.S. 1, 91 S.Ct. 1889 (1971) 6
Gray vs. Sanders, 372 U.S. 368, 83 S.Ct. 801 (1963) .. 7
Kramer vs. Union Free School District No. 15, 395 U.S. 621, 89 S.Ct. 1886 (1969) 7, 8
Reynolds vs. Sims, 377 U.S. 533, 84 S.Ct. 1362 (1964) 6
Sailors vs. Board of Education of Kent County, 387 U.S. 105, 87 S.Ct. 1549 (1967) 5

STATUTES AND CONSTITUTIONAL PROVISIONS.

New York Constitution
Article 9, Section 1(h)(1) 3, 8

IN THE

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Appellees,

and

JOHN J. GHEZZI, Secretary of State of the State of New York, ARTHUR LEVITT, Comptroller of the State of New York, LAVERNE S. GRAF, Clerk of the County Legislature, County of Niagara, New York and KENNETH COMERFORD, County Clerk, County of Niagara, New York.

Appellees.

MOTION TO AFFIRM

Appellees, Citizens for Community Action at the Local Level, Inc. and Francis W. Shedd (hereinafter referred to as appellee CALL), pursuant to Rule 161(d) of the Rules of the Supreme Court of the United States, move to affirm the final judgment of the District Court on the ground that the decision of the District Court is so obviously correct under the principles established by this Court as to warrant no further review by this Court.

BRIEF OF APPELLEES

Opinion Below

The opinion of the District Court for the Western District of New York (Appendix A, *infra*, pp. 1a-17a) is reported at 386 F.Supp. 1.

Jurisdiction

The jurisdictional requisites are adequately set forth in the appellants' Jurisdictional Statement.

Constitutional and Statutory Provisions Involved

The Jurisdictional Statement sets forth the Constitutional and Statutory Provisions Involved.

Questions Presented

The following questions are presented on this appeal:

(1) Whether creation of dual voting units of unequal population within a single political subdivision of a state, consisting of the cities of a county and the areas outside of the cities, and the concomitant requirement of separate majorities in each unit for adoption in a county-wide referendum of a county charter form of local government, so dilutes and debases the rights of the county-wide majority as to violate the one man, one vote principle.

(2) Whether dismissal of a prior action brought in the federal court by the County of Niagara, purportedly on behalf of its citizens and voters, against the State of New York which raised substantially the same issues as raised herein, constitutes a bar to the instant class action under the doctrine of res judicata.

Statement of Case

The County in New York State is a general unit of local government. Article 9 of the New York Constitution, the local government article, which was adopted in 1963, contains a provision, Article 9, § 1(h)(1), for the adoption of an alternative form of county government, commonly known as a County Charter form, which primarily converts county government from a single branch legislative form of local government to an executive-legislative form. The provision applies to all areas of the State other than New York City and contains the proviso that no such form of government or amendment thereof shall become effective unless approved on a referendum by a majority of the votes cast in the area of the county outside the cities and in the cities of the county, if any, considered as one unit. On September 6, 1972, the Niagara County Legislature adopted a Niagara County Charter, the express purpose of which was the separation of the County Legislative and Executive functions and responsibilities; the securing of the greatest possible County Home Rule, and the accomplishment of increased efficiency, economy and responsibility in the Niagara County government. By the express terms of the Charter, no function, facility, duty or power of any city, town, village, school

district or other district was to be transferred, altered or impaired by the Charter (Appellee CALL's brief, Appendix A, pp. 11-13).

On November 7, 1972, the proposed Charter was voted upon by the voters of the entire geographical unit, the County of Niagara. It received a majority vote in the County as a whole but was not certified as the duly adopted government of Niagara County because it did not receive a separate majority vote in the towns of the County, the area of the County outside the cities, and thus was declared defeated.

The population of the cities of Niagara County as a unit is 147,026. The population of the area outside the cities is 88,694 (Amended Complaint, Exhibit B). In the 1972 referendum, a total of 55,393 votes were cast. 11,594 negative votes were cast in the towns of Niagara County, 20.93% of the total vote, which minority vote prevented the adoption of the Charter. Theoretically, by the dual majority requirement, one negative vote in the towns of the County could cancel out 147,026 affirmative votes in the cities of the County.

The original defendants have not appealed the judgment herein. Subsequent to his decision not to appeal the judgment of the three-judge District Court, the New York Secretary of State certified the 1972 Niagara County Charter and a County Charter placed on the ballot in the 1974 general election (while this action was pending in the District Court), which also received a majority vote of all the voters of Niagara County, but did not receive a separate majority vote of the voters in the area outside the cities.

ALTHOUGH THE PRECISE ISSUE HEREIN MAY NOT HAVE BEEN PREVIOUSLY DECIDED, THE DECISION OF THE THREE-JUDGE DISTRICT COURT ADOPTS ESTABLISHED LAW AND SHOULD BE AFFIRMED WITHOUT PLENARY CONSIDERATION.

I

The contention of the appellant that the right of the states to establish the form and structure of subordinate governments is not subject to the Fourteenth Amendment is not a correct statement of the established law.

The rule is stated in *Gomillion vs. Lightfoot*, 364 U.S. 339, 81 S.Ct. 125 (1960); that the exercise of the power of the states to create forms and structures of local government is not insulated from federal judicial review when state power is used as an instrument for circumventing a federally protected right.

The appellant, in the Jurisdictional Statement, blends the sovereignty argument with the one man—one vote argument. He relies principally upon the statement that the determination of the form and structure of subordinate state government instrumentalities is a political matter over which the States have exclusive control. Such statement is not a correct statement of the law. The creation of forms or structures of municipal government is subject to the Equal Protection Clause. *Gomillion vs. Lightfoot, supra.* Once the state provides for the election of a local government official or agency, the constitutionally protected right to equal suffrage applies to such election. *Sailors vs. Board of Education of Kent County*, 387 U.S. 105, 87 S.Ct. 1549 (1967). The Constitution imposes one ground rule for the developmental arrangements of local

government; a requirement that units of local government with general governmental powers over an entire geographic area not be apportioned so as to violate the right of equal suffrage. *Avery vs. Midland County, Texas*, 390 U.S. 474, 88 S.Ct. 1114 (1968).

II

The secondary argument of the appellant that the one man--one vote principle does not apply to an election to determine the form or structure of a unit of local government with general governmental power is inconsistent with the line of cases on the subject in this Court.

It is established law in this Court that the nature of the election is irrelevant to the distribution of the voting franchise in regard to a unit of general government. *Reynolds vs. Sims*, 377 U.S. 533, 84 S.Ct. 1362 (1964); *Cipriano vs. Houma*, 395 U.S. 701, 89 S.Ct. 1897 (1969); *City of Phoenix vs. Kolodziejski*, 399 U.S. 204, 90 S.Ct. 1990 (1970); *Gordon vs. Lance*, 403 U.S. 1, 91 S.Ct. 1889 (1971).

III

The state's classification of voters based upon their residence, a suspect classification, required that such classification meet the compelling state interest test. No evidence of the necessity or justification for the classification is offered in this case.

In the District Court and in the Jurisdictional Statement, it is alleged that the rural voters are primarily affected within the county unit of general government and therefore they have a special interest to be protected.

Gray vs. Sanders, 372 U.S. 368, 83 S.Ct. 801 (1963) declared that form of voter classification constitutionally defective.

Further, the defense is a matter of proof, that such classification is necessary to promote an articulated state goal in which the state has a compelling state interest. *Kramer vs. Union Free School District No. 15*, 395 U.S. 621, 89 S. Ct. 1886 (1969). There is no evidence in this case in support of such a defense.

IV

The concluding argument of the appellant, and really his only available argument, is that the classification of voters into city voters and town voters is a justifiable exercise of state action. Such classification is constitutionally defective.

In the two pages of the Jurisdictional Statement preceding that conclusion, the appellant alleges that the town voters have interests to protect against encroachment and diminution, that they have a direct stake in their existing town governments, that the proposed charter would have very material effects on existing local control of local matters and on the responsibility for and payment of various services (pp. 19-20, Juris. St.).

The appellant says that such protection against encroachment is also available to the city voters. But since the city voters approved the proposed charter, they obviously do not see the disadvantages alleged by the intervenor appellant.

First, the allegations of the appellant were not established in the District Court and are not a part of the record or papers on this appeal. There has been no evidence introduced of a compelling state interest, based upon an articulated state goal, which would justify the impingement upon the fundamental constitutional right of equal suffrage which is the defect of Article 9, § 1(h)(1) of the New York Constitution. In the absence of such evidence, the exclusionary classification of the separate voting units should be struck down *Kramer vs. Union Free School District No. 15, supra.*

Secondly, the allegation of encroachment and diminution of the powers and prerogatives of the towns, if the County Charter goes into effect, is refuted by the Charter itself which provides that no function, facility, duty or power of any city, town, village, school district or other district shall be transferred, altered or impaired by such Charter. (Amended complaint, Exhibit A, Abstract, Niagara County Charter, Article XXII, appellee's brief, Appendix A, p. 13).

Finally, the appellant concludes his argument that the urban voters of New York State have a vehicle for relief against town voters because 10.6 million people reside within the cities while 7.5 million live in the towns (Juris. St. P. 20). The statement is erroneous because approximately 8 million of those city dwellers in New York State live in New York City and Article 9, § 1(h)(1) of the New York Constitution does not apply to New York City. It only applies to counties not wholly contained in a city, thus excluding the five counties which comprise New York City (*McKinney's Consolidated Laws of New York, Book 2, Constitution, Article 9, § 1(h)(1), added 1963*).

In making such argument, he focuses on the urban-rural classification which is the root of the insidious discrimination implanted in this State constitutional provision. The United States Constitution does not recognize a city voter or a rural voter or a town voter. Only citizens cast votes.

V

The decision by the Court below that in the prior action Niagara County was not representing the class of aggrieved voters who bring this action is amply supported. However, the contention by the appellant that the aggrieved voters made no effort to preserve the original action is incorrect.

Before the time to appeal in the prior action, *County of Niagara vs. State of New York,* expired, the appellee voter, Francis W. Shedd, appeared personally before the Niagara County Legislature, advised such body, the present governing body of the County of Niagara, that he was appearing on behalf of the class of voters who had voted in favor of the proposed Niagara County Charter and requested, on behalf of such class of voters, that the Niagara County Legislature direct the Niagara County Attorney to file a notice of appeal to preserve the original action. The Niagara County Legislature refused to act favorably upon such request (Affidavit of J. J. Phelan, 8/3/73, motion to strike defense of collateral estoppel).

Conclusion

The decision of the three-judge District Court applied fundamental principles of equal suffrage to a state's classification of voters into voting units of unequal population, based upon place of residence, within the geographic area of a unit of local government having general governmental powers. There was no evidence in the case of the necessity or justification for the creation of such voting units within the geographic area in which the election franchise was granted.

The judgment of the District Court should be affirmed without plenary consideration.

Respectfully submitted,

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and

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Attorneys for Appellees, Citizens for Community Action at the Local Level, Inc. and Francis W. Shedd, Individually and on Behalf of All Others Similarly Situated.

May, 1975.

APPENDIX A

Portion of Abstract of Proposed Charter for Niagara County

ARTICLE I—*Niagara County and Its Government*

Charter constitutes form of government for Niagara County. Purposes include "The separation of county legislative and executive functions; the securing of all possible county home rule; and the accomplishment of greater efficiency and responsibility in county government." Within limits prescribed by the County Law, Charter supersedes inconsistent provisions of other laws.

ARTICLE II—*Legislative Branch*

County Legislature continues as "the legislative, appropriating, governing and policy determining body of the county" with no change in numbers. The term of office of the members shall be four years. Local laws and ordinances are subject to veto by the County Executive; veto may be overriden by ⅔ vote.

Sums of money appropriated by any one or more items, or parts of items, or parts of item in any law or resolution appropriating money for the use of the county government or any agency or commission, are subject to veto by the County Executive; veto may be overriden by a majority vote.

ARTICLE III—*Executive Branch*

There shall be a County Executive who shall be elected from the County at large, and who shall at all times be a qualified elector of the County. He shall hold no other public office except as otherwise herein provided; shall give

his whole time to the duties of the office, and shall receive therefor a compensation as fixed by the County Legislature. His term of office shall begin with the first day of January, 1974, next following his election and shall be for four years. County Executive is chief executive and administrative head of county government. Provision is made for removal and designation of Acting County Executive. In the office of County Executive, there are six divisions: Budget, Purchase, Central Services, Research, Traffic Safety and Advisory Board, and Recreation and Related Programs, appointment of these Executive Division heads is also subject to confirmation.

ARTICLE IV—*Department of Audit and Control*

There shall be a department of audit and control headed by a comptroller who shall be elected from the county at large.

His term of office shall be for four years beginning with the first day of January next following his election. The provisions of this section with respect to such election shall not take effect until the general election of 1973 at which a comptroller shall be elected for a four year term to commence January 1, 1974, and every comptroller elected thereafter shall have a term of four years. At the time of his election and throughout his term of office he shall be a qualified elector of the county, shall devote his whole time to the duties of his office, and shall hold no other public office.

• • •

ARTICLE XXII—*Service Relationships*

No function, facility, duty or power of any city, town, village, school district or other district or of any officer thereof is or shall be transferred, altered or impaired by this charter or code. The County of Niagara shall have power to contract with any public corporation including but not limited to a municipal, district or public benefit corporation as defined in Section 3 of the General Corporation Law or with any public authority or combination of the same for the establishment, maintenance and operation of any facility and the rendering of any service which each of the contracting parties would have legal authority to establish, maintain, operate or render for itself. The costs and expenses incurred as well as charges for central facilities and administrative services relating thereto shall be borne proportionately by each such contracting party as agreed upon.

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IN THE

Supreme Court of the United States

October Term, 1974

No. 74-1390

TOWN OF LOCKPORT, NEW YORK, and FLOYD SNYDER, Individually and as Supervisor of the Town of Lockport,
Appellants,

vs.

CITIZENS FOR COMMUNITY ACTION AT THE LOCAL LEVEL, INC. and FRANCIS W. SHEDD, Individually and on Behalf of All Others Similarly Situated,
Appellees,

and

JOHN J. GHEZZI, Secretary of State of the State of New York, ARTHUR LEVITT, Comptroller of the State of New York, LAVERNE S. GRAF, Clerk of the County Legislature, County of Niagara, New York and KENNETH COMERFORD, County Clerk, County of Niagara, New York,
Appellees.

APPEAL FROM A THREE JUDGE COURT OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NEW YORK.

RESPONSE TO BRIEF OF APPELLEES GRAF AND COMERFORD IN REPLY TO JURISDICTIONAL STATEMENT OF APPELLANTS

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INDEX.

PAGE

Preliminary Statement 1

This Appeal Is Not Moot 3

A. Question I Raised By The Jurisdictional Statement Of Appellants Is Not Moot 3

B. Question II Raised By The Jurisdictional Statement Of Appellants Is Not Moot 6

C. Question III Raised By The Jurisdictional Statement Of Appellants Is Not Moot 6

Conclusion 8

Table of Cases.

Citizens for Community Action, etc., et al. v. *Ghezzi, etc., et al.*, 361 F. Supp. 1 (W.D.N.Y. 1974) 2

County of Niagara, New York, v. *State of New York*, Civ. 1972-656 (W.D.N.Y. April, 1973) 7

Moore v. *Ogilvie*, 394 U.S. 814, 89 S.Ct. 1493 (1969) 4, 5

Southern Pacific Terminal Co. v. *Interstate Commerce Commission*, 219 U.S. 498, 515, 31 S.Ct. 279, 283 (1910) 5

United States v. *Munsingwear, Inc.*, 340 U.S. 36, 39, 71 S.Ct. 104, 106 (1950) 5

Statutes and Constitutional Provisions.

New York Municipal Home Rule Law, Section 33(7) ..2, 3, 4

New York State Constitution, Article IX, Section 1 (h)(1) 2, 3, 4

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and

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Appellees.

RESPONSE TO BRIEF OF APPELLEES GRAF AND COMERFORD IN REPLY TO JURISDICTIONAL STATEMENT OF APPELLANTS

Preliminary Statement

On May 5, 1975, Appellants Town of Lockport, New York and Floyd Snyder, docketed an appeal in this Court

(Docket No. 74-1390) appealing from a Judgment of the United States District Court for the Western District of New York convened as a three-Judge Court.

That judgment in *Citizens for Community Action, etc., et al.* v. *Ghezzi, etc., et al.*, 361 F. Supp. 1 (W.D.N.Y. 1974) declared unconstitutional Article IX Section 1(h)(1) of the Constitution of the State of New York and Section 33(7) of the Municipal Home Rule Law. Additionally, injunctive relief was granted by the Court requiring the filing and implementation of the Niagara County Charter which was passed by a majority of the voters in a referendum held November 7, 1972.

Appellee John J. Ghezzi, Secretary of State of the State of New York did not appeal from that judgment.

Appellees LaVerne S. Graf and Kenneth Comerford have filed a Reply to the Jurisdictional Statement of Appellants in which they contend that the questions raised by the jurisdictional statement are now moot.

The basis for the mootness argument by Appellees Graf and Comerford is that the 1972 Niagara County Charter was supplanted by a Charter passed by a referendum of the Niagara County electorate on November 5, 1974. That Charter has since been accepted for filing by Appellee Ghezzi pursuant to his statutory duty as Secretary of State of the State of New York.

By letter dated June 18, 1975, the Honorable Michael Rodak, Jr., Clerk of the Court informed counsel for Appellee John J. Ghezzi, that this Court had directed that a responsive pleading be filed by Appellee Ghezzi responding to those contentions of mootness.

This brief is submitted pursuant to that direction by this Court.

THIS APPEAL IS NOT MOOT

A. Question I Raised By The Jurisdictional Statement Of Appellants Is Not Moot

Appellants ask this Court to review the determination by the District Court that Article IX, Section 1(h)(1) of the Constitution of the State of New York and Section 33(7) of the New York Municipal Home Rule Law are violative of Amendment Fourteen to the United States Constitution.[1]

This issue is viable even though the 1972 Charter has been superseded by the 1974 Charter.[2]

The issue transcends the vehicle which brought it to the District Court.

The 1972 Charter was passed by a majority of the Niagara County electorate. However, it failed to gain approval by the Towns of that County. As a result, and pursuant to the provisions of law challenged by plaintiffs below and subsequently held unconstitutional by the District Court, that Charter could not be accepted for filing by Appellee John J. Ghezzi, as Secretary of State.

During the pendency of the action in the District Court, the 1974 Charter was placed before the Niagara County electorate and was again passed by the majority of the voters but again failed to gain the approval of the majority of the voters residing in the Towns of Niagara County.

---

[1] Jurisdictional Statement For Appellants, p. 5, Docket No. 74-1390 (May 5, 1975).

[2] Although the District Court ordered the implementation of the 1972 Charter, the 1974 Charter had been approved by the Niagara County Electorate prior to the judgment of the District Court.

The same allegations of unconstitutionality of the provisions of New York State Law which prohibited the filing of the 1972 Charter would apply should Appellee Ghezzi as Secretary of State have failed to file the 1974 Niagara County Charter.[3] In fact, should this Court dismiss the appeal for mootness, one could reasonably predict a new action by Appellees Citizens for Community Action and Francis Shedd, attacking the 1974 Charter on the same basis as their challenge to the 1972 Charter.[4]

The substance of the lawsuit below never dealt in any manner with the contents of the 1972 Charter, but only with the statutes of the State of New York which governed its adoption.

The constitutional issues remain to be authoritatively adjudicated by this Court. The question presented by Question I of the Jurisdictional Statement is not moot.

In *Moore* v. *Ogilvie,* 394 U.S. 814, 89 S. Ct. 1493 (1969) this Court reaffirmed the standard applicable to a controversy alleged to have been rendered academic by succeeding events.

Moore, involved a suit for declaratory relief brought by candidates for the offices of electors of President and Vice President of the United States from Illinois. The plaintiffs were to be candidates on the November 5, 1968 ballot.

[3] Appellee Ghezzi accepted the 1974 Charter on February 28, 1975 following the Judgment of the District Court declaring Article IX, Section 1(h)(1) of the New York State Constitution and Section 33(7) of the Municipal Home Rule Law unconstitutional.

[4] Appellees Citizens for Community Action and Francis Shedd, the plaintiffs below, have asked this Court for a Summary Affirmation of the judgment below. (See p. 10 Motion to Affirm and Brief of Appellees Citizens for Community Action and Francis W. Shedd, Docket #74-1390, May, 1975.)

Plaintiffs sought the declaration of unconstitutionality and the enjoining of certain Illinois statutes alleged by plaintiffs to be violative of this Court's "one man, one vote" decisions. The statutes sought to be enjoined barred their being on the November 1968 ballot. The three-Judge United States District Court dismissed the Complaint. Before the appeal could be heard in this Court the election was held. Defendants moved this Court for a dismissal of the appeal on the ground of mootness.

This Court recognized that as long as Illinois maintained her system of nominating such candidates the problem was

> "'Capable of repetition yet evading review.' *Southern Pacific Terminal Co.* v. *Interstate Commerce Commission,* 219 U.S. 498, 515, 31 S.Ct. 279, 283, 55 L. Ed. 310 (1910). The need for its resolution thus reflects a continuing controversy in the federal-state area where our 'one man, one vote' decisions have thrust." *Moore* v. *Ogilvie, supra,* 394 U.S. 814, 816, 89 S.Ct. 1493, 1494 (1969).

This Court refused to dismiss the appeal as moot.

Similarly, in the instant case, the ground of decision by the District Court and therefore the issue on the appeal is whether the provisions of the New York State Constitution and the statute involved, violates the "one man, one vote" decision of this Court. That issue is not moot notwithstanding that the 1972 Charter has been superseded by the 1974 Charter.

Should this Court dismiss the appeal for mootness and vacate the judgment of the District Court pursuant to its practice in such situations, *United States* v. *Munsingwear, Inc.,* 340 U.S. 36, 39, 71 S. Ct. 104, 106 (1950), the question in the instant appeal, "is capable of repetition yet evading review." *Southern Pacific Terminal Co.* v. *Interstate Commerce Commission, supra.*

B. Question II Raised By The Jurisdictional Statement Of Appellants Is Not Moot

Question II propounded by Appellants urges this Court to reverse the District Court upon the grounds that the Court granted injunctive relief improperly. Jurisdictional Statement of Appellants, *supra* at 21.

The thrust of Appellants' argument is that the electorate of Niagara County voted on the proposed Charter believing that the Charter had to obtain the dual majority required by the State Constitution and Municipal Home Rule Law in order to become effective. Similarly, Appellants argue that those proponents of the Charter taking an active role in seeking its approval managed their voter education campaigns based upon the dual majority requirement.

Both the 1972 and 1974 Niagara County Charter Referendums occurred prior to the District Court's decision and Order holding the dual majority requirement unconstitutional.

The issues raised by Question II of Appellants' Jurisdictional Statement apply to the 1974 Charter as well as to the 1972 Charter.

C. Question III Raised By The Jurisdictional Statement Of Appellants Is Not Moot

Question III propounded by Appellants urges this Court to reverse the District Court upon the grounds that Plaintiffs-Appellees Citizens for Community Action and Francis W. Shedd were barred from commencing the lawsuit below on the grounds of *res judicata*. Jurisdictional Statement, *supra*, at 22-23.

The basis for this contention by Appellants is that the District Court erred in finding no privity as between the Plaintiffs-Appellees in the instant case and the plaintiffs in a prior action.[5]

The questions of privity and the application of *res judicata* do not involve, in any manner, the contents of the Charters. Rather, they involve issues only as to whether the unsuccessful Plaintiffs in *County of Niagara* were sufficiently representative of Plaintiffs-Appellees Citizens for Community Action and Francis W. Shedd, so as to have barred them from commencing the lawsuit now before this Court.

---

[5] In 1973 an action in the name of *County of Niagara, New York* v. *State of New York*—Civ. 1972-656 (W.D.N.Y. April 3, 1973) was dismissed on the merits. (See Appendix D to Jurisdictional Statement of Appellants, pp. 24a-28a). That action sought relief identical to that sought in the instant case. The District Court, (HENDERSON, J.), held the constitutional issues raised to be insubstantial.

Conclusion

The questions presented to this Court for review involve the constitutionality of portions of the New York State Constitution and New York State Municipal Home Rule Law. Additionally, the questions involve legal issues unrelated to the contents of either the 1972 or 1974 Niagara County Charters. Those issues are capable of repetition unless reviewed and determined by this Court.

The questions are not moot.

Dated: July 2, 1975.

Respectfully submitted,

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Appellees.

APPEAL FROM A THREE JUDGE COURT OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NEW YORK.

APPELLANTS' BRIEF ON THE ISSUE OF MOOTNESS

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July, 1975.

BATAVIA TIMES, APPELLATE COURT PRINTERS
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TABLE OF CONTENTS.

	Page
Status of the Proceeding	2
I. This Case Has Become Moot	6
A. The Constitution forbids judicial action except where a live controversy exists	7
B. This case does not fall within any of the recognized exceptions to the mootness doctrine	9
C. Practical considerations support a determination of mootness	12
II. The judgment below should be reversed and vacated, with directions on remand to dismiss the proceeding	14
Appendix 1:	
Motion for Stay of Enforcement of Judgment	15
Affidavit in Support of Motion for Stay	17
Exhibit A, Letter Dated April 14, 1975	21
Affidavit in Opposition to Motion for Stay	25
Letter Dated December 10, 1974	27
Page 4 of a Decision and Order	29
Reply Affidavit in Support of Motion for Stay	30
Appendix 2:	
District Court Decision and Order Denying Motion for Stay	34
Appendix 3:	
Statement of Differences Between the 1972 and 1974 Charters	35

Page

Appendix 4:

Department of State Letters Confirming Filing of Charters 43

Appendix 5:

Notice of Motion to Vacate Judgment 45

Affidavit in Support of Motion to Vacate 46

Answering Affidavit in Opposition to Motion to Vacate Judgment 50

Supplemental Affidavit in Support of Motion to Vacate Judgment 52

Affidavit in Opposition to Motion to Vacate Judgment (Shedd) 54

Appendix 6:

District Court Decision and Order Denying Motion to Vacate Judgment 57

TABLE OF CASES.

Amalgamated Association of Street, Electric, Railway and Motor Coach Employees of America, Division 998 v. Wisconsin Employment Relations Board, 340 U.S. 416 (1951) 13
Carasas v. LaVellee, 391 U.S. 234 (1968) 10
Diffenderfer v. Central Baptist Church, 404 U.S. 412 (1972) 14
Doremus v. Board of Education, 342 U.S. 429 (1952) 9
Dunn v. Blumstein, 405 U.S. 330 (1972) 10
Golden v. Zwickler, 394 U.S. 103 (1969) 9
Gray v. Sanders, 372 U.S. 368 (1963) 11
Hall v. Bealls, 396 U.S. 45 (1969) 14
Liner v. Jafco, Inc., 375 U.S. 301 (1964) 7

Page

Mancusi v. Stubbs, 408 U.S. 204 (1972) 10, 11
Moore v. Ogilive, 394 U.S. 814 (1969) 10
Oil Workers Union v. Missouri, 361 U.S. 363 (1960) . 8
Rescue Army v. Municipal Court, 331 U.S. 549 (1947) 7
Roe v. Wade, 410 U.S. 113 (1973) 8, 10
Rosario v. Rockefeller, 410 U.S. 755 (1973) 10
Sibron v. New York, 392 U.S. 40 (1968) 10
Socialist Labor Party v. Gilligan, 406 U.S. 583 (1972) 12
Southern Pacific Terminal Co. v. ICC, 219 U.S. 498 (1911) 9
Spoomer v. Littleton, 414 U.S. 514 (1974) 14
Storer v. Brown, 415 U.S. 724 (1974) 10
Super Tire Engineering Co. v. McCorkle, 416 U.S. 115 (1975) 10
U.S. v. Concentrated Phosphate Export Association, 393 U.S. 199 (1968) 11
U.S. v. Munsingwear, Inc., 340 U.S. 36 (1950) 14
United States v. W. T. Grant Company, 345 U.S. 629 (1953) 11

RULES.

Federal Rules of Civil Procedure, Rule 60 6
New York Civil Practice Law and Rules, Section 217 6

CONSTITUTIONS.

Article III, Section 2 7
New York State Constitution, Article IX, Section 1(h)(1) 3, 12
New York State Municipal Home Rule Law, Section 33(7) 3, 12

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Appellees.

Appeal from a Three Judge Court of the United States District Court for the Western District of New York.

APPELLANTS' BRIEF ON THE ISSUE OF MOOTNESS

The appellants request that this Court declare the issues in this proceeding moot, reversing and vacating the January 9, 1975 judgment with instructions on remand to dismiss.

Status of the Proceeding

The substantive facts of the case are recited in appellants' Jurisdictional Statement.

Appellants understood that respondents were proceeding to effectuate the 1972 Charter as provided in the January 9, 1975 judgment, specifically with respect to the inclusion on the November 1975 ballot of elections for the Charter-created positions of County Executive, County Comptroller and County Legislature. Since the validity of that judgment had not yet been passed upon by this Court, and because of appellants' concern that the proposed elections would thus lack the integrity necessary to proper elections, appellants applied to the District Court for an order staying enforcement of the judgment pending this appeal.[1] The District Court denied the stay, on the ground that the application might better be made to this Court.[2] The stay was denied despite the advice to this Court from the Niagara County officials by letter dated April 14, 1975 that potential qualified candidates would be dissuaded from seeking office under the Charter because of the pendency of the appeal.[3]

The papers submitted by respondents in opposition to the motion for stay indicated respondents were not proceeding to put into effect the 1972 Charter as required by the January 9, 1975 judgment, but were instead putting into effect a purported new County Charter which was the subject of a referendum held on November 5, 1974. The decision in this case was filed by the District Court on November 22, 1974.

[1] The papers submitted by the parties on that motion are annexed as Appendix 1.

[2] The District Court's Decision and Order are annexed as Appendix 2.

[3] See Appendix 1, page 15.

The proposed 1974 Charter contained the following explicit provision:

> "Section 101. *Title and Purpose.* This charter, together with any and all amendments hereto, if any, shall provide for and constitute the form of government for Niagara County, and shall supersede any and all other forms of government for the County of Niagara, including any charter previously adopted, and shall be known and may be cited as the 'Niagara County Charter' . . ."

At the November 5, 1974 referendum, the proposed 1974 Charter was placed on the ballot as follows:

> "Question Number One.
>
> "Shall Local Law No. 2 of 1974 providing for a change in the present form of county government to a charter form of county government be approved?"

The proposed 1974 Charter did not obtain the voter approval required by the New York State Constitution, Article IX, Section 1(h)(1), or New York State Municipal Home Rule Law, Section 33(7), since a majority of voters outside of the cities voted "No" on the question.

Prior to the entry of the District Court's January 9, 1975 judgment, respondents requested that the Court make the judgment applicable to the 1974 Charter rather than to the 1972 Charter, in order to provide that the 1974 Charter would be the "instrument defining the form of local government for Niagara County".[4] Since the case as filed, processed and decided dealt solely with the proposed 1972 Charter and the 1972 referendum, and neither the parties nor the Court had addressed themselves to the proposed 1974 Charter, and since there was at that time no case or controversy concerning the proposed 1974 Charter, the District Court properly refused

[4] See Appendix 1, p. 15.

the application. There were and are material differences between the two Charters.[5] The circumstances before, at and after the 1974 referendum were, of course, different than those appertaining in 1972.

The January 9, 1975 judgment, which is the subject matter of the pending appeal, dealt wholly and solely with the 1972 Charter, specifically providing:

> "3. The Niagara County Charter was duly adopted by a majority affirmative vote in the countywide referendum held on November 7, 1972 and
>
> 4. The county charter contained in Niagara County Local Law No. 1 of 1972 is in full force and effect as the instrument defining the form of local government for Niagara County and it is further
>
> ADJUDGED and decreed that the defendants are enjoined and directed to file and implement the Niagara County Charter set forth in Local Law No. 1 of 1972 for Niagara County which local law was the subject of a countywide referendum in Niagara County on November 7, 1972 and which local law was approved by a majority of the popular vote in such election."[6]

Instead of proceeding in accordance with the judgment and effectuating the 1972 Charter, respondents went through the motions of filing the 1972 Charter, at the same time filing the 1974 Charter, and thereafter proceeding to attempt to enforce the 1974 Charter as the "instrument defining the form of local government for Niagara County". At the time of oral argument of appellants' motion for stay, respondents Citizens for Community Action at the Local Level, Inc. and Francis Shedd acknowledged their agreement with and concurrence in the actions taken by the other respondents.

[5] See Appendix 3, Statement of Differences Between the 1972 and 1974 Charters.

[6] See pp. 20a and 21a, Appellants' Jurisdictional Statement.

Despite previous assurances and public statements that the New York State Attorney General would file and prosecute an appeal to this Court from the January 9, 1975 judgment, it was announced shortly before the expiration of the statutory appeal period that no appeal would be prosecuted. In view of this announcement, appellants obtained an Order to Show Cause on February 27, 1975, to gain intervention in order to process this appeal. On the next day, both the 1972 and 1974 Charters were filed by the Comptroller and the Secretary of State.[7]

On appellants' application for a stay of enforcement of the January 9, 1975 judgment, opposing papers were filed only by the Niagara County respondents. Those papers indicated and confirmed that the respondents had taken and were pursuing actions which had in effect destroyed the subject matter of this case, which would deprive the appellants from obtaining meaningful relief on this appeal, and which had rendered this proceeding moot.

Consequently, appellants moved the District Court for an order vacating its January 9, 1975 judgment on the ground that the respondents had rendered the proceeding moot.[8] After service of appellants' motion papers, appellants received copies of the "Reply to Jurisdictional Statement" filed by the Niagara County respondents with this Court. Point III of that Reply is entitled:

> "III. The question before the Court in regard to the 1972 Charter is now moot."

Despite the concession by respondents that this proceeding had become moot, the District Court denied appellants' motion to vacate in a terse decision, stating that the ap-

[7] See Appendix 4, Secretary of State Letters of Confirmation of Filing.

[8] Appendix 5 contains the papers filed on the motion to vacate.

plication was not within the purview of Federal Rules of Civil Procedure, Rule 60.[9]

To avoid being foreclosed from attacking the validity of the proposed 1974 Charter, by the four-month Statute of Limitations specified in New York Civil Practice Law and Rules, Section 217, appellants have been required to commence a special proceeding in the New York State Supreme Court to enjoin the respondents from attempting to implement the purported 1974 Charter. That action was commenced by service of Notice and Petition on June 27, 1975, and is now pending.

I. This Case Has Become Moot.

While questions of mootness frequently require difficult and close decisions, this case presents a unique and simple situation. Both appellants and the Niagara County respondents agree that the subject matter of the action has been extinguished and the case has thus become moot.

The specific and sole purpose of this action was to obtain an order enjoining and directing the Niagara County and State respondents to file and to certify Niagara County 1972 Local Law No. 1, providing for the adoption and implementation of a new charter form of government for the County. The subject matter of the action was the validity of the proposed 1972 Charter as put to referendum in November 1972. The judgment which is questioned on this appeal declared the 1972 Charter to be "in full force and effect as the instrument defining the form of local government for Niagara County".

The actions of the State and County respondents—fully concurred in by the respondents Shedd and Citizens for Community Action—have mooted the case. Respondents have at no time sought to implement the 1972 Charter. On the contrary, a new and different Charter which superseded any pre-existing Charter was purportedly adopted in 1974. All respondents are proceeding on the basis that the 1974 Charter is the instrument defining the form of local government for Niagara County. As a consequence, respondents have effectively destroyed the subject matter of this action.

[9] See Appendix 6, District Court Decision and Order, June 11, 1975, Denying Motion to Vacate.

By design or otherwise, respondents are attempting to insulate the decision and judgment of the District Court in this action by precluding the appellants from obtaining any meaningful relief on this appeal. For, if this Court should reverse the judgment and order dismissal of the complaint, the effect would be to declare invalid the 1972 Charter—which is no longer in existence and which respondents, in any event, are not seeking to enforce or implement.

A. The Constitution forbids judicial action except where a live controversy exists.

Article III, Section 2, of the Constitution requires as a condition to federal jurisdiction the existence of a live case or controversy. *Liner v. Jafco, Inc.*, 375 U.S. 301 (1964).

This Court's appropriate sensitivity to this jurisdictional prerequisite is clearly reflected in a number of recent mootness decisions. For example, in *Rescue Army v. Municipal Court*, 331 U.S. 549 (1947), the Court declined to exercise jurisdiction and dismissed the appeal, stating at page 570:

> "If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality . . . unless such adjudication is unavoidable." *Spector Motor Service v. McLaughlin*, 323 U.S. 101, 105. It has long been the Court's 'considered practice not to decide abstract, hypothetical or contingent questions . . . or to

> decide any constitutional question in advance of the necessity for its decision . . . or to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied . . . or to decide any constitutional question except with reference to the particular facts to which it is to be applied . . .' " *Alabama State Federation of Labor v. McAdory*, 325 U.S. 450, 461. 'It is not the habit of the Court to decide questions of a constitutional nature unless absolutely necessary to a decision of the case.' *Burton v. United States*, 196 U.S. 283, 295."

In *Oil Workers Union v. Missouri*, 361 U.S. 363 (1960), the Court articulated its constitutional functions in the following language:

> ". . . the duty of this Court 'is to decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it.' *Mills v. Green*, 159 U.S. 65, 653. See *Bus Employees v. Wisconsin Board*, 340 U.S. 416. To express an opinion upon the merits to the appellants' contentions would be to ignore this basic limitation upon the duty and function of the Court, and to disregard principles of judicial administration long established and repeatedly followed."

In the case at bar, respondents seek to take advantage of their own conduct in rendering the case moot by urging that their self-created mootness finalizes the January 9, 1975 judgment and deprives the appellants of any right to seek reversal of that judgment. The argument advanced is that the intervening mootness precludes this Court from exercising control over the lower Court's judgment. This is, of course, not the law, nor could it be if appellate rights and procedures are to have any meaning. The Court recently gave voice to the controlling principle in *Roe v. Wade*, 410 U.S. 113 (1973), where it said at page 125:

> "The usual rule in federal cases is that an actual controversy must exist at stages of appellate or certiorari review, and not simply at the date the action is initiated."

In *Golden v. Zwickler*, 394 U.S. 103 (1969), an action had been commenced to obtain a declaratory judgment holding that a New York State law prohibiting anonymous election handbilling was unconstitutional. In reversing the District Court's determination that the prerequisites of declaratory judgment had been established, the Court held that the proceeding had become moot because the Congressman who was the target of the handbilling had taken a judicial position and would not likely be a candidate again.

In *Doremus v. Board of Education*, 342 U.S. 429 (1952), the Court held that a case involving prayer in public schools had become moot inasmuch as the child on whose behalf the suit had been commenced had graduated from school. The Court reasoned that any right the child may have had could not now be protected because she was no longer in school.

Any rights plaintiff-respondents had with respect to the implementation of the 1972 Charter have now passed, since that Charter has, with their concurrence, been extinguished and is not being implemented. There is no longer any live controversy in this proceeding.

B. This case does not fall within any of the recognized exceptions to the mootness doctrine.

The decisions of the Court indicate that there are three principal exceptions to application of the mootness doctrine. None of these exceptions has application here.

1. The Court has refused to dismiss for mootness where the question involved is "capable of repetition, yet evading review". See *Southern Pacific Terminal Co. v. ICC*, 219 U.S. 498 (1911).

The basic rationale for this exception appears to be that review should not be foreclosed by the fact that the time element involved in the questioned activity is so short that the activity under review is necessarily completed before the judicial procedure can be completed. This exception has no relevance to the instant case since the mooting events are not inherent in the situation (such as in cases relating to voting in a specific election, pregnancy and so on) but in fact are intervening voluntary actions by respondents. The constitutionality of the New York constitutional and statutory provisions are capable of being tested in a properly brought proceeding, involving an actual and live controversy, without mooting events occurring because of any inherent time limitation. The following cases indicate the type of situation in which this exception has application and indicate that it has no relevance to this proceeding. *Super Tire Engineering Co. v. McCorkle*, 416 U.S. 115 (1975); *Storer v. Brown*, 415 U.S. 724 (1974); *Rosario v. Rockefeller*, 410 U.S. 755 (1973); *Roe v. Wade*, 410 U.S. 113 (1973); *Dunn v. Blumstein*, 405 U.S. 330 (1972); *Moore v. Ogilive*, 394 U.S. 814 (1969).

2. The Court has refused to dismiss for mootness where there are collateral consequences from the questioned activity. In cases such as *Mancusi v. Stubbs*, 408 U.S. 204 (1972), *Sibron v. New York*, 392 U.S. 40 (1968), and *Carasas v. LaVellee*, 391 U.S. 234 (1968), the Court held that even though the specific issue in the case had become moot, there were continuing consequences to the litigants which demanded review and resolution of the issues presented. Essentially, these cases involve circumstances where criminal sentences have been served but the collateral consequences flowing from the convictions give the parties a sufficient continuing personal stake in the matter to allow the Court to make a negative mootness determination. There are, of course, no continuing collateral consequences of the this nature stem-

ming from the purported adoption of the 1972 Charter or its abandonment by the respondents. In fact, respondents themselves urge that the 1972 Charter has been repudiated and superseded by the 1974 referendum and Charter. The result is that the 1972 Charter and referendum have passed from the scene, leaving no rights which now press for adjudication. What is now at issue is whether the purported 1974 Charter has been properly adopted and effectuated.

3. The Court has on occasion declined to dismiss for mootness where the defendant voluntarily discontinues the questioned activities. The Court has refused to reach a finding of mootness at a number of cases where the defendants have discontinued the questioned action, on the ground that there could be no assurance that the questioned activity would not be resumed once the judicial process had been terminated by the finding of mootness. This was the rationale for the exception when it was first applied in *United States v. W. T. Grant Company*, 345 U.S. 629 (1953). The same rationale was employed in the later decisions of *Mancusi v. Stubbs*, *supra*; *U.S. v. Concentrated Phosphate Export Association*, 393 U.S. 199 (1968); and *Gray v. Sanders*, 372 U.S. 368 (1963).

In the case at bar, the respondents have taken the position that the proposed 1972 Charter has been completely superseded, extinguished and replaced by the 1974 Charter. Respondents are not proceeding in any fashion to implement or to attempt to implement the 1972 Charter. Respondents advise the Court that no such effort will be made. In addition, the appellants who assert mootness have absolutely no ability and no intention to attempt to engage in the questioned activity raised in the proceeding as initially filed, that is, the implementation of the 1972 Charter. Accordingly, this exception has no application in this case.

C. Practical considerations support a determination of mootness.

The issues involved in any consideration of the constitutionality of Article IX of the New York State Constitution or of Section 33(7) of the Municipal Home Rule Law of New York are of far-reaching importance. At the date of this submission, 105 towns and villages in the state of New York had adopted formal resolutions of support for the position being taken by the intervening appellants in this action. The reasons for the inclusion of Article IX in the Constitution and for the passage of the municipal Home Rule Law, and the governmental justifications for the dual majority requirement with respect to changes in the form of local government, are of critical importance in assessing whether the Fourteenth Amendment has any application and in determining the propriety of the procedures adopted by New York State. Unfortunately, the present proceeding comes to the Court with an extraordinarily spare record. No testimony or evidence was adduced to establish the practical and governmental justifications for the New York State provisions. On the contrary, the judgment below is predicated on cross-motions for summary judgment without benefit of any factual presentation to establish that there is no unreasonable, "invidious discrimination" proscribed by the so-called one man, one vote concept. Adjudications of this magnitude should not be made in a factual vacuum. The issues and the Courts deserve substantially more in the way of a record with respect to a matter of such significance.

As the Court stated in *Socialist Labor Party v. Gilligan*, 406 U.S. 583 (1972), at page 588:

> "This Court has recognized in the past that even when jurisdiction exists it should not be exercised unless the case 'tenders the underlying constitutional issues in clean-cut and concrete form' *Rescue Army v. Municipal Court*, 331 U.S. 549, 584 (1947)."

In *Amalgamated Association of Street, Electric, Railway and Motor Coach Employees of America, Division 998 v. Wisconsin Employment Relations Board*, 340 U.S. 416 (1951), the Court made the following observations at page 418:

> "It is argued that the Wisconsin courts have adopted a practice of deciding questions of importance even though the case has become moot, and we are urged to follow that same practice. But whatever the practice in Wisconsin courts, 'A federal court is without power to decide moot questions or to give advisory opinions which cannot affect the rights of the litigants in the case before it. *United States v. Alaska S.S. Co.*, 253 U.S. 113, 115-16, and cases cited; *United States v. Hamburg—American Co.*, 239 U.S. 466, 475-77.' *St. Pierre v. United States*, 319 U.S. 41, 42 (1943)."

Since the respondents have totally abandoned, and in fact have extinguished, the proposed 1972 Charter, a decision on this appeal would be an advisory opinion which would not affect the rights of the litigants with respect to the subject of the action.

In addition, there is a pending proceeding relating specifically to the propriety of the 1974 Charter, the referendum concerning it, and the actions of the respondents with respect to the 1974 Charter. It is anticipated that a full and complete record will be developed in that case concerning the justifications for the State constitutional and statutory provisions governing the adoption and change of local forms of government. As a consequence, if constitutional objections are again raised, the Courts will have a full and complete record dealing with a concrete case and a live controversy.

Since, as conceded by respondents, this proceeding has become moot, and since none of the exceptions to the mootness doctrine have application, it is submitted that the Court should adhere to previous rulings and declare the case to be moot.

II. The judgment below should be reversed and vacated, with directions on remand to dismiss the proceeding.

The governing principle regarding the consequences of mootness was stated in *U.S. v. Munsingwear, Inc.*, 340 U.S. 36 (1950), at page 39:

> "The established practice of the Court in dealing with a civil case from a court in the federal system which has become moot while on its way here or pending our decision on the merits is to reverse or vacate the judgment below and remand with a direction to dismiss . . . that procedure clears the path for future relitigation of the issues between the parties and eliminates a judgment, review of which was prevented through happenstance."

The few decisions providing for remand with permission for amendment of the complaint, such as *Diffenderfer v. Central Baptist Church*, 404 U.S. 412 (1972), and *Spooner v. Littleton*, 414 U.S. 514 (1974), have no application here, since the District Court has already refused to deal with the 1974 Charter, and since the 1974 Charter is the specific subject of a pending proceeding before the Courts of the State of New York. See *Hall v. Bealls*, 396 U.S. 45 (1969).

Respectfully submitted,

VICTOR T. FUZAK, ESQ.,
Attorney for Appellants,
1800 One M & T Plaza,
Buffalo, New York 14203,
Telephone: 856-4000.

July, 1975.

APPENDIX 1.

Motion for Stay of Enforcement of Judgment

UNITED STATES DISTRICT COURT
Western District of New York

CITIZENS FOR COMMUNITY ACTION AT THE LOCAL LEVEL, INC. and FRANCIS W. SHEDD, Individually and on Behalf of All Others Similarly Situated,

Plaintiffs,

vs.

JOHN J. GHEZZI, Secretary of State of the State of New York, ARTHUR LEVITT, Comptroller of the State of New York, LA VERNE S. GRAF, Clerk of the County Legislature, County of Niagara, New York and KENNETH COMERFORD, County Clerk, County of Niagara, New York,

Defendants,

and

THE TOWN OF LOCKPORT, New York, and FLOYD SNYDER, Individually and as Supervisor of the Town of Lockport,

Intervening Defendants.

Civil 1973-222

This is a motion brought on behalf of the Town of Lockport and Floyd Snyder, intervening defendant-appellants, pursuant to Rule 18 of the Revised Rules of the Supreme Court of the United States, for an order staying and enjoining

the further enforcement of and actions pursuant to the judgment of this Court entered in the above-entitled proceeding on January 9, 1975, pending determination by the United States Supreme Court of an appeal filed on March 6, 1975 by the intervening defendant-appellants, and docketed with that Court on May 5, 1975.

The grounds of this motion are that actions should not be taken pursuant to the judgment of January 9, 1975 to implement the challenged Niagara County Charter until such time as the validity of that judgment and of the proposed Charter are determined by the United States Supreme Court, and that it would appear that by reason of the rules of the Supreme Court and its calendar, final determination of the appeal cannot be had prior to the time for the filing of nominating petitions for the proposed new positions of County Executive and County Comptroller, or before the holding of primary elections in September of this year, and, apparently, before the time for general elections on November 4, 1975.

PLEASE TAKE NOTICE, that this motion will be brought on for argument before this Court at 11 o'clock a.m., Monday, May 19, 1975.

s/ VICTOR T. FUZAK, ESQ.,
Attorney for Intervening Defendant-Appellants.
1800 One M & T Plaza,
Buffalo, New York 14203,
Telephone: 856-4000.

Dated: Buffalo, New York, May 9, 1975.

Affidavit in Support of Motion for Stay.

(Same Title.)

State of New York,
County of Erie. } ss.:

VICTOR T. FUZAK, being duly sworn, deposes and says:

1. I am the attorney for the intervening defendants, Town of Lockport and Floyd Snyder. This affidavit is made and filed in support of an application by the intervening defendants pursuant to Rule 18 of the Rules of the Supreme Court for a stay of the enforcement of the judgment of this Court entered on January 9, 1975 and a stay of further actions pursuant to that judgment by state and local governmental officials.

2. Rule 18 of the Rules of the United States Supreme Court requires that: "Whenever an appellant entitled thereto desires a stay on appeal, he may present for approval to a judge of the Court whose decision is sought to be reviewed, or to such Court when action by that Court is required by law, or, subject to paragraph 2 hereof, to a justice of this Court, a motion to stay the enforcement of the judgment appealed from . . ."

3. The judgment entered in this proceeding on January 9, 1975 provides: (a) that the Niagara County Charter was duly adopted by the referendum held on November 7, 1972; (b) that the said Charter is in full force and effect as the instrument defining the form of local government for Niagara County; and (c) that the local and state governmental defendants are enjoined and directed to file and to implement the Charter. Upon information and belief, the said governmental defendants have accepted the Charter for filing, are im-

plementing the Charter, and intend to proceed further pursuant to its terms despite the fact that an appeal from the judgment of this Court entered January 9, 1975 is presently pending before the United States Supreme Court.

4. The Town of Lockport and Floyd Snyder were granted permission to intervene as defendants in this proceeding on March 5, 1975, for the purpose of prosecuting an appeal from the January 9, 1975 judgment to the United States Supreme Court. The intervening defendants filed a notice of appeal on March 6, 1975. The intervening defendants have filed and served the required number of copies of jurisdictional statement to the United States Supreme Court within the time prescribed therefore by statute, that is, on or before May 5, 1975. All actions required to be taken to effect and to complete the docketing of the appeal with the United States Supreme Court have been timely accomplished. Under the rules of that Court, the appellees have until June 4, 1975 to file motion papers in opposition to the appeal. Under the rules of the Court, the jurisdictional statement will be presented to the Court by the Clerk upon receipt of such motion papers or June 5, whichever first occurs. The matter will be considered by the Court after that date. A copy of the jurisdictional statement accompanies this motion and is made a part of this application.

5. An immediate consequence of the implementation of the Charter, pursuant to the appealed judgment of January 9, 1975, is to create the new elective offices of County Executive and County Comptroller, and four-year as opposed to two-year terms for County Legislators. Deponent is advised and believes that petitions for primary elections for those positions will be circulated beginning June 16, 1975 and must be filed by July 14, 1975; that primary elections are scheduled to be held in September; and that the general elections with

respect to these positions would be held on November 4, 1975. Deponent has been advised by the office of the Supreme Court Clerk that the pending appeal will not be considered and determined until the October 1975 term of the Court, and that accordingly there is no assurance of a ruling, preliminarily noting jurisdiction, or finally disposing of the appeal, before November 4, 1975. On the contrary, it would appear that the appeal will not be determined prior to that date. It would appear therefore that actions pursuant to the challenged Charter will be taken, unless stayed, prior to the time that the Supreme Court will have an opportunity to rule on the pending appeal and on the validity of the Charter. It is submitted that the Charter should not be permitted to become effective or to prescribe the form of local government for the County of Niagara until such time as the Supreme Court has had an opportunity to consider and to rule upon the validity of the determinations of this Court that the provisions of Article IX of the New York State Constitution and of Section 33(7) of the New York State Municipal Home Rule Law are in violation of the Fourteenth Amendment to the United States Constitution. If a stay of the judgment of January 9, 1975 is not granted, and the Supreme Court declares that judgment to be invalid, the public tranquility and governmental processes of Niagara County will be violated by implementation of a Charter not adopted in accordance with existing state law. It is submitted that until the matter is finally determined, the proposed Charter should not be put into effect and elections for offices which will be nonexistent if the Supreme Court reverses the January 9, 1975 judgment should not be held.

6. Significantly, Niagara County government officials apparently concur in the view that the holding of elections pursuant to the proposed Charter, prior to a final ruling concerning its validity, would be inappropriate and disruptive.

On or about April 14, 1975, a letter was forwarded to the Clerk of the United States Supreme Court in reference to this proceeding, on the letterhead of the office of the County Attorney of Niagara County, and presumably from the Charter Committee of the Niagara County Legislature. A copy of this communication is annexed to this affidavit as Exhibit A. No copy of the communication was forwarded to deponent as counsel of record for the intervening defendant-appellants. Deponent learned of the existence of the communication from reports in the press and obtained a copy directly from the Clerk of the Supreme Court. Nevertheless, the communication verifies and concedes that election processes pursued under the questioned Charter prior to a ruling on the pending appeal by the Supreme Court would lack the integrity necessary for proper election procedures.

7. Accordingly, it is respectfully requested that a stay of and injunction against enforcement of, or actions under or pursuant to, the judgment of this Court filed on January 9, 1975, or under or pursuant to the Charter referred to therein, be entered pending final determination of the appeal in this matter to the Supreme Court, and that, pursuant to Rule 62(c) of the Rules of Civil Procedure, each of the three judges initially considering this matter assent to the entry of the order sought by this application.

s/ VICTOR T. FUZAK.

Subscribed and sworn to before me
this 9th day of May, 1975,
s/ Carole L. Zeiher,
Notary Public, State of New York,
Qualified in Erie County.
My Commission Expires March 30, 1976.

EXHIBIT A

Letter Dated April 14, 1975

Office of the
COUNTY ATTORNEY
of Niagara County
Lockport, New York 14094
Telephone 716 433-3857

April 14, 1975

Clerk
United States Supreme Court
United States Supreme Court Building
Washington, D.C. 20543

Re: Citizens for Community Action at the
Local Level, Inc., et al

vs. John J. Ghezzi, Secretary of State of the
State of New York, et al. and the
Town of Lockport, et al

Dear Sir:

We are writing this letter to respectfully bring to your attention and, hopefully, to expedite the above case which involves, among other things, the election of a county executive and county legislators for four year terms in the County of Niagara, New York, in the November 1975 election.

The State of New York has accepted the 1974 Charter for filing and if there is a September primary, petitions for nominating the county executive must be circulated this current June. While we are not restrained by the Court from so doing, those persons who desire to run for county executive are certainly disadvantaged by having to proclaim

their candidacy while the matter of the office of county executive is awaiting a final decision by the United States Supreme Court. In addition to spending huge sums of money for primaries and general elections, a person might leave current employment, or another elected office, in order to accept the position of county executive, only to discover that he or she has no job at all. We are reasoning, of course, that the Supreme Court could conceivably rule unfavorably after the county executive assumes office on January 1, 1976.

Since it is now April of 1975, it is obvious that those interested in running for county executive in Niagara County will not have the matter decided in time to be free of the worry of a Court decision. May 6, 1975 is the last day for the jurisdictional statement to be filed with the United States Supreme Court. After that, the United States Supreme Court must note probable jurisdiction before the time commences within which briefs and records must be filed. After probable jurisdiction is noted, the various litigants will have approximately sixty (60) days to file briefs and records before the Court will even consider a motion for advancement on the calendar.

It would therefore seem difficult at best for the United States Supreme Court to hear this case before October, 1975.

The Charter Committee sympathizes with the Towns of the County of Niagara if, in fact, they have reason to be concerned, in their worry over the possibility of annexation without the opportunity for the town populace to defeat such a move by the double referendum. At the same time, however, this committee, the majority of Niagara County voters and the Niagara County Legislature feel a county executive is needed.

Therefore, it is suggested that that part of the lawsuit dealing with an annexation possibility be decided by the Court and that the charter, as passed by the electorate of the County of Niagara, be adjudged to be valid so that no one has to contend for the office of county executive pending the outcome of a Court decision.

Very truly yours,

CHARTER COMMITTEE
NIAGARA COUNTY LEGISLATURE

s/ Leonard C. Gademsky, Jr.
Leonard C. Gademsky, Jr., Chairman

Legislator Donald P. Lane	Merton Marshall
Legislator Russell Parker	Lay Member
Legislator Doris D. Hampton	Clarence Gray
Legislator George G. McLane	Lay Member
Legislator Lee Simonson	Frank Moran
Legislator Wilfred G. Miles	Lay Member

MAL:mlc
cc: Senator Jacob Javits
Senator James L. Buckley
Representative John J. LaFalce
N.Y. Senator Lloyd H. Paterson
Assemblyman Matthew J. Murphy
Assemblyman John B. Daly
Honorable John T. Curtin
Niagara County Legislature
Niagara Gazette
Tonawanda News
Union Sun & Journal
Courier Express
Buffalo Evening News
Radio & TV media

Enc.

TO: NIAGARA COUNTY LEGISLATURE
FROM: CHARTER COMMITTEE
DATE: MARCH 18, 1975

WHEREAS, the Federal District Court for the Western District of New York has judicially approved the Charter enacted in 1972 for Niagara County, and

WHEREAS, the Secretary of State of the State of New York has accepted for filing both the 1972 and 1974 Charters for the County of Niagara, and

WHEREAS, certain persons have intervened in the lawsuit for the purpose of taking an appeal to the United States Supreme Court, and

WHEREAS, it is vitally important for the United States Supreme Court to expedite their decision in this matter because of the following:

(a) If a county executive is elected together with county legislators for four year terms, and if after those terms begin in 1976 the United States Supreme Court decides that the charter is invalid, then a situation would present itself in which the elected county executive would have his position dissolved and acts taken by the county executive and county legislators might later be held to be invalid, or in the alternative, the charter is later upheld by the United States Supreme Court after the time for filing designating petitions under the New York State Election Law, a situation would result where the county committees of various political parties might be making a parties' choice for county executive instead of having a full and open primary, as was intended by the charter committee, and

WHEREAS, a person elected to county executive whose position might be dissolved if an adverse decision by the

United States Supreme Court was rendered, said person would have given up his prior employment, perhaps as an elected official, to his detriment, now, therefore, be it

RESOLVED, that the Niagara County Legislature go on record as imploring the United States Supreme Court to use all possible speed in deciding this lawsuit, and be it further

RESOLVED, that a copy of this resolution be forwarded to the Clerk of the United States Supreme Court.

CHARTER COMMITTEE
MERTON MARSHALL
(Illegible Signatures)

(Illegible Signatures)

The resolution was adopted—March 18, 1975.

MAL:(Illegible)

Affidavit in Opposition to Motion for Stay.

(Same Title.)

State of New York, }
County of Niagara. } ss.:

SAMUEL L. TAVANO, being duly sworn, deposes and says:

1. That he is the County Attorney for the County of Niagara, and he is making this affidavit in opposition to a Motion for the Stay of Enforcement of Judgement of this Court entered January 9, 1975.

2. The Election to occur in November of 1975 for the office of county executive has nothing to do with the 1972 Charter approved by this Court. Subsequent to the Court's judgment, the County of Niagara duly filed a Charter which was approved by the voters on the 5th day of November, 1974 and filed by the State of New York, and which is now the official document for the governance of the County of Niagara. Since the judgment of the Court in regard to the 1972 Charter relates to a charter in the year 1972 and nothing more, this Court has absolutely no jurisdiction to prevent the County of Niagara from having a Charter government or holding elections pursuant to the Charter which was passed in 1974.

3. Furthermore, the County of Niagara applied to the Federal District Court for the Western District of New York to make the Court's ruling applicable to the 1974 Charter and was refused. (See letter dated December 19, 1974 annexed hereto and made a part hereof). If the Court refused that application because the validity of the 1974 Charter was not before the Court at that time, I fail to see how it can possibly stay the election scheduled for November of 1975 without the moving party commencing another action and asking for an injunction in regard to the 1974 Charter.

4. Annexed hereto and made a part hereof, is Page Four (4) of a Decision and Order entered by this Court which has the following language:

> "At the oral argument on March 3, 1975, an application was made for stay of the judgment previously entered. That application is denied with the concurrence of the other two panel members. Also, the intervenors furthermore represented to the court that the appeal would be pressed in an expeditious manner."

Your dependent fails to see any change of circumstance that would now make a stay of judgment applicable.

WHEREFORE, your deponent requests that the Motion For Stay of Enforcement of the Court's Judgment of January 9, 1975 be denied in its entirety.

SAMUEL L. TAVANO,
Niagara County Attorney.
Court House,
Lockport, New York 14094.

Sworn to before me this
15th day of May, 1975
Peggy A. Shea
Notary Public, State of New York
Qualified in Niagara County
My Commission Expires March 30, 19....

Letter Dated December 10, 1974.

December 10, 1974

Honorable John T. Curtin
United States District Judge
United States District Court
Western District of New York
United States Courthouse
Niagara Square
Buffalo, New York 14202

Re: Citizens For Community Action At The Local Level, Inc. et al

vs. John J. Ghezzi, Secretary of State of the State of New York, et al

CIV-1973-222

Dear Judge Curtin:

This letter is to set forth the position of the County of Niagara in the matter of settling the order in this action. Enclosed is a

certification of our Board of Elections showing that a charter was passed at the general election in 1974, and a copy of the Local Law with the certification of the Clerk of the Legislature and the County Attorney. The Local Law is the text of the charter passed in 1974. Also enclosed is a copy of the letter from the Secretary of State rejecting the filing of said 1974 charter.

We feel it would save much time, effort and money if the adjudgment of the Court could be amended to include the 1974 charter, allowing the State Attorney General's office to appeal from the 1972 charter passage and the 1974 charter passage. The 1974 charter contains a provision which indicates that it supercedes any and all other prior charters (see Article I, Section 101, 1974 charter).

I would suggest the Court could take judicial notice of the documents we now submit. It is also a possibility that we could proceed by way of stipulation. I will ask the other attorneys to stipulate to this method of entering judgment.

Very truly yours,

SAMUEL L. TAVANO
County Attorney

MILES A. LANCE
Assistant County Attorney

MAL:mlc
cc: John J. Phelan, Esq.
Michael G. Wolfgang, Esq.

Enc.

Page 4 of a Decision and Order.

and also the individual applicant's interest. The applicants, having fulfilled all of the requirements of Rule 24, shall be allowed to intervene in this action.

Although this application was made to the undersigned individually, before ruling upon it I conferred by telephone with Circuit Court Judge William H. Timbers and United States District Court Judge Harold P. Burke who concurred in my decision to grant an order of intervention.

At the oral argument on March 3, 1975, an application was made for stay of the judgment previously entered. That application is denied with the concurrence of the other two panel members. Also, the intervenors furthermore represented to the court that the appeal would be pressed in an expeditious manner.

It is so ordered.

JOHN T. CURTIN,
United States District Judge.

Dated: March 5, 1975.

Reply Affidavit in Support of Motion for Stay.

(Same Title.)

State of New York, }
County of Erie. } ss.:

VICTOR T. FUZAK, being duly sworn, deposes and says:

1. This affidavit is filed in response to the affidavit of Samuel L. Tavano dated May 15, 1975 filed on behalf of the Niagara County defendants, in opposition to the intervening defendant-appellants' motion for a stay of enforcement of this Court's order of January 9, 1975.

2. In connection with this matter, deponent has proceeded on the premise that the Niagara County and New York State governmental officials have acted in compliance with the judgment and order of this Court of January 9, 1975. The Niagara County Attorney's affidavit advises the parties and the Court that this has not been the case. The judgment and injunction of this Court dated January 9, 1975 specifically provided in part as follows:

> "4. The county charter contained in Niagara County Local Law No. 1 of 1972 is in full force and effect as the instrument defining the form of local government for Niagara County and it is further
>
> "ADJUDGED and decreed that the defendants are enjoined and directed to file and implement the Niagara County Charter set forth in Local Law No. 1 of 1972 for Niagara County which local law was the subject of a countywide referendum in Niagara County on November 7, 1972 and which local law was approved by a majority of the popular vote in such election."

Accordingly, the judgment of this Court is clear and specific in declaring that the Niagara County Charter set forth in Local Law No. 1 of *1972* for Niagara County ". . . *is* in full force and effect as the instrument defining the form of local government for Niagara County." This Court's judgment of January 9, 1975 specifically enjoins and directs the Niagara County and New York State governmental officials named as defendants in the action to file and implement *the Niagara County Charter which was the subject of the referendum held on November 7, 1972.*

It now appears that instead of complying with the explicit terms of this Court's judgment and injunction, the Niagara County and New York State governmental officials have proceeded to file and to attempt to implement another and different Local Law and another and different proposed Charter for the County of Niagara. The intervening defendant-appellants respectfully submit to the Court that the Niagara County and New York State governmental officials were without jurisdiction or authority to ignore and to refuse to proceed in accordance with the explicit terms of this Court's judgment of January 9, 1975, and that the purported 1974 Charter and Local Law may not be accepted or implemented by those officials.

3. Significantly, the Local Law and Charter which the Niagara County Attorney advises the Court has been filed and accepted by the Niagara County and New York State governmental officials was the subject of a referendum on November 5, 1974, two months before the Court's January 9, 1975 judgment was entered. As the County Attorney's affidavit indicates, a request was made by the Niagara County Attorney to have the January 9, 1975 judgment provide for the filing and implementation of the 1974 Local Law and proposed Charter, rather than to have that judgment and order apply to

the 1972 Local Law and proposed Charter. The Court refused this request ruling instead that "The county charter contained in Niagara County Local Law No. 1 of 1972 is in full force and effect as the instrument defining the form of local government for Niagara County . . ." and as stated above, directing the governmental officials to file and implement that 1972 Local Law as distinguished from the proposed 1974 Local Law and Charter.

4. The intervening defendant-appellants request therefore that this Court enter an order staying the implementation of its judgment and injunction of January 9, 1975, and further, that this Court enter an order declaring that the actions of the Niagara County and New York State governmental officials in filing and attempting to implement the 1974 Charter are contrary to and in violation of this Court's judgment and injunction of January 9, 1975, and enjoining and restraining those officials from in any way implementing or proceeding under or pursuant to the 1974 Local Law and proposed Charter. The Court has jurisdiction to enjoin violation of its order and judgment, and to stay the operation of that order and judgment.

5. The determination of the Court not to grant the oral application for a stay made on behalf of the intervening defendant-appellants at the time of agrument of the motion for intervention does not foreclose this application or preclude the granting of the relief sought. The oral application for a stay was not made on formal moving papers. The oral application for stay was made at a time prior to the entry of an order granting the intervening defendant-appellants the right to intervene and therefore standing to appeal before this Court and the Supreme Court. The facts as presently known, and as recited in the affidavit filed with the notice of motion in this application, support the good sense and necessity of

staying actions under any proposed new charter until the important constitutional issues determining validity are finally resolved by the Supreme Court.

s/ VICTOR T. FUZAK.

Subscribed and sworn to before me
this 16th day of May, 1975
s/ Carole L. Zeiher
Notary Public, State of New York
Qualified in Erie County
My Commission Expires March 30, 1976.

APPENDIX 2.

District Court Decision and Order Denying Motion for Stay.

(Same Title.)

Appearances:

Moot, Sprague, Marcy, Landy, Fernbach & Smythe (John J. Phelan, Esq., of Counsel), Buffalo, New York, for Plaintiffs.

Louis J. Lefkowitz, Esq., Attorney General, State of New York (Michael G. Wolfgang, Esq., of Counsel), Buffalo, New York, for Defendants Ghezzi and Levitt.

Samuel L. Tavano, Esq., Niagara County Attorney, Lockport, New York, for Defendants Graf and Comerford.

Hodgson, Russ, Andrews, Woods & Goodyear (Victor T. Fuzak, Esq., of Counsel), Buffalo, New York, for Intervening Defendants.

After considering the papers and the oral argument made by the intervenors, Town of Lockport and Floyd Snyder, I conferred with Judges William H. Timbers and Harold P. Burke. They concur with me that the motion for stay should be denied.

Under the circumstances, it appears that it would be more appropriate for the application to be made to a Justice of the Supreme Court.

So ordered.

JOHN T. CURTIN,
United States District Judge.

Dated: May 22, 1975.

APPENDIX 3.

Statement of Differences Between the 1972 and 1974 Charters.

ARTICLE II—LEGISLATIVE BRANCH

Section 202(a) *Powers and Duties*: 1974 Charter omits any mention of a Budget Review Officer who serves at the pleasure of the County Legislature as was provided for in the 1972 Charter.

Section 202(c): 1974 Charter here, as in other places, Section 208, Section 302(g), Section 311(a), Section 1602, the word "ordinance" is deleted.

Section 202(f): 1974 Charter the phrase "appointing officer" is substituted for "employing officer".

Section 202(k): 1974 Charter has grants general authority to create positions deemed necessary for County government; in the 1972 Charter this section was limited to the creation of deputy positions.

Section 205 *Filing and Publication of Local Laws; Judicial Notice:* 1974 Charter requires filing and publication as provided by the Municipal Home Rule Law or other applicable statutes; the 1972 Charter required compliance with Section 306 of the County Law.

Section 206 *Referendum:* 1974 Charter omits statement as in 1972 Charter that County Legislature may provide for referendum if not required by law.

ARTICLE III—EXECUTIVE BRANCH

Section 302 *Powers and Duties:* 1974 Charter, the phrase "supervise and direct" replaced the phrase "supervise and recommend" of the 1972 Charter.

Section 307 *Division of Central Services:* 1974 Charter omits the enumerated powers of County sealers of weights and measures as contained in the 1972 Charter.

Section 308 *Division of Economic Development and Planning:* 1974 Charter omits Sections 308 *Division of Research,* 309 *Division of Traffic Safety; Advisory Board,* and 310 *Division of Recreation and Related Programs,* as contained in the 1972 Charter.

Section 311(b) *Line Item Veto Power:* 1974 Charter sets a five day limit and requirement of two-thirds vote to restore a vetoed line item, in contract to no time limit in Section 313(b) of the 1972 Charter and a simple majority vote to restore a vetoed line item.

ARTICLE IV DEPARTMENT OF AUDIT AND CONTROL (1972): This Article of the 1972 Charter is entirely omitted from the 1974 Charter.

ARTICLE IV DEPARTMENT OF FINANCE (1974): (Article V, 1972 Charter).

Section 401 *Department of Finance; Commissioner; Election; Elective Office of Treasurer Abolished:* 1974 Charter provides for the election of a commissioner of finance for a four year term; the 1972 Charter, Section 501, provides for the appointment of the Commissioner of finance by the County Executive with confirmation by the County Legislature.

Section 402(c): 1974 Charter provides for the submission of reports to the County Legislature as the County Legislature may provide; the 1972 Charter requires in Section 502(b) that a general balance sheet be submitted on or before April 1 of each year to the County Legislature.

Section 402(e), (f), (g), (h), (i), (j), (k): 1974 Charter sets forth detailed functions of the commissioner of finance not contained in the 1972 Charter.

Section 403—*Division of the Department:* not contained in the 1972 Charter.

ARTICLE V—FINANCIAL PROCEDURES—1974 Charter (Article VII-1972 Charter)

Section 503 *Proposed Budget and Capital Program by County Executive:* 1974 Charter omits the provision that unencumbered balances should be treated as revenue for the ensuing fiscal year as provided for in the 1972 Charter, Section 703.

Section 505 *Review of Proposed Budget; Capital Program and Message:* 1974 Charter omits Budget Review Officer as a reviewer of the proposed budget as provided in the 1972 Charter, Section 705.

Section 507(b) *Adoption of Budget:* 1974 Charter states specifically that the line item veto power of County Executive applies to budgets adopted by the County Legislature; not provided for in the 1972 Charter, Section 707(b).

Section 507(e): 1974 Charter provides that the budget as formally adopted should be balanced; not provided for in the 1972 Charter.

Section 509 *Appropriations; Supplemental and Emergency:* 1974 Charter is phrased in general terms; the 1972 Charter, Section 709, specifically provides how the County Legislature must proceed.

Section 514 *Summary of Receipts and Expenditures,* and Section 515 *Independent Audit:* two additional sections included in the 1974 Charter but not present in the 1972 Charter.

Appendix 3—Statement of Differences Between the 1972 and 1974 Charters.

ARTICLE VII BOARD OF ACQUISITION AND CONTRACT—1974 CHARTER (Article IX—1972 Charter)

Section 701 *Board Created; Power and Duties:* 1974 Charter provides for the approval of County Legislature; not included in the 1972 Charter, Section 901.

Section 702 *Execution of Contracts:* 1974 Charter provides for award of contracts to low st responsible bidder if expenditure is in excess of ar ounts set forth in General Municipal Law or other applic..ole state law, requiring a copy of the executed contract to be filed with the commissioner of finance; the 1972 Charter, Section 902, sets the amount at "more than $2,500", requiring filing with commissioner of finance and the County Comptroller.

ARTICLE VIII—DEPARTMENT OF PUBLIC WORKS

Section 801 *Department of Public Works; Commissioner; Qualification:* 1974 Charter omits 1972 provision that parks department, if any, should be a division of public works, and continues this exclusion in remaining Sections 802 and 803.

Section 803 *Division of the Department:* 1974 Charter provides that division heads be appointed by commissioner of public works subject to County Legislature approval; the 1972 Charter provided that superintendent of each division should be appointed as presently provided by local law or resolution of the County Legislature.

ARTICLE IX—DEPARTMENT OF PARKS AND RECREATION: 1974 CHARTER

This entire article is new, and not contained in the 1972 Charter.

Appendix 3—Statement of Differences Between the 1972 and 1974 Charters.

ARTICLE XI—DEPARTMENT OF HEALTH—1974 CHARTER (Article XII-1972 Charter)

Section 1101 *Department of Health; Commissioner; Qualifications:* 1974 Charter provides that Commissioner be appointed pursuant to applicable state statutes, the 1972 Charter, in Section 1201, requires that the Commissioner be a licensed physician in New York State and experienced in public health administration.

Section 1104—*Sanitary Code*—1974 Charter empowers Board of Health to formulate and adopt health regulations; all provisions of the Niagara County Sanitary Code in effect at the time of the charter adoption to remain in full force. Under the 1972 Charter, Section 1204, the health board may recommend health regulations which the County Legislature may adopt; no provision for current Niagara County Sanitary Code to remain in effect. The 1974 Charter does not contain the 1972 provision for Sanitary Code to be published and filed.

ARTICLE XIII—DEPARTMENT FOR YOUTH—1974 CHARTER

New article not contained in the 1972 Charter.

ARTICLE XIV—DEPARTMENT FOR THE AGING—1974 CHARTER

New article not contained in the 1972 Charter.

ARTICLE XIV—DEPARTMENT OF ECONOMIC DEVELOPMENT AND PLANNING—1972 CHARTER

This entire article is omitted from the 1974 Charter.

ARTICLE XV—DEPARTMENT OF PERSONNEL

Section 1501, *Application of Article XV; Niagara County Civil Service Commissioner Continues; Civil Service Law to Apply:* 1974 Charter provides that the powers, duties and functions of the Civil Service Commission may be transferred to the Department of Personnel at the discretion of the County Legislature; no similar provision in the 1972 Charter.

ARTICLE XVI—DEPARTMENT OF LAW

Section 1601 *Department of Law; County Attorney:* 1974 Charter provides that the County Attorney be appointed by and term be the same as the County Executive; the 1972 Charter provides that the County Attorney be appointed by and term be the same as the County Legislature.

ARTICLE XVII—DEPARTMENT OF RECORDS

Section 1702 *Power and Duties:* 1974 Charter omits 1972 provision that County Clerk shall perform duties required or delegated to him by the County Executive or the County Legislature.

ARTICLE XVIII—DISTRICT ATTORNEY

Section 1802 *Powers and Duties:* 1974 Charter omits 1972 provision that District Attorney perform duties required or delegated to him by the County Executive or the County Legislature.

ARTICLE XX SHERIFF 1974 CHARTER (Article XIX—1972 Charter):

Section 2002—*Powers and Duties*—1974 Charter omits 1972 provision that Sheriff shall perform duties required or delegated to him by the County Executive or the County Legislature.

ARTICLE XXII OTHER COUNTY BOARDS, OFFICES, INSTITUTIONS AND FUNCTIONS—1974 CHARTER (Article XXI-1972 Charter):

Section 2202 *Probation Officer:* 1974 Charter provides for appointment under Section 256(5) of Executive Law of State of New York; the 1972 Charter, Section 2102, provides for appointment under Section 938-b of the Code of Criminal Procedure of State of New York.

Section 2207 *Additional Appointments by County Executive:* 1974 Charter contains modifying language "upon consideration of recommendations of the veterans' service agencies in the county", which is not contained in the 1972 Charter, Section 2105.

ARTICLE XXIII—GENERAL PROVISIONS

Section 2303 *Civil Service rights Continued; Status of Certain County Offices previously Appointed; Removal of Certain County Offices hereafter Appointed:* 1974 Charter omits 1972 provision for removal of County officers, appointed by the County Executive for a definite term, who are subject to confirmation by the County Legislature, requiring a hearing by a bi-partisan board of review consisting of five members of the

County Legislature appointed by its chairman, and a majority vote of the board of review to effect the removal.

Section 2304 *Classified Service, Exemption:* 1974 Charter provides for different itemization of divisions within the executive branch.

Section 2305 *Filling Vacancy in Elective Office . . .*: 1974 Charter has different enumeration of elective County offices coming within the purview of the Article.

Section 2306 *Filling Vacancy in Office of County Executive:* 1972 Charter provided a specific section on filling vacancy in County Executive office; the 1974 Charter provides for filling of vacancy under general provision of Section 2305 by following Section 400(7) of the County Law.

ARTICLE XXIV—APPLICATION OF CHARTER

Section 2407 *Charter Review Board; Establishment; Members; Term:* 1974 Charter specifies the constitution of the Charter Review Board—seven legislatures and five lay persons; no similar provision in the 1972 Charter.

APPENDIX 4.

Department of State Letters Confirming Filing of Charters.

Mario M. Cuomo
Secretary of State

Maurice Flasterstein
Administrative Director

(Seal)

State of New York
DEPARTMENT OF STATE
162 Washington Avenue
Albany, New York 12231

March 3, 1975

Laverne S. Graf, Clerk
Niagara County Legislature
Court House
Lockport, New York

Dear Sir:

Please be advised that Local Law No. 3 of 1974 of the County of Niagara was received and filed on February 28, 1975.

We enclose herewith additional forms for the filing of local laws for your future use.

Very truly yours,

BARRY F. BOHAN
Barry F. Bohan
Director
State Records and Law Bureau

cc: State Comptroller
Division of Municipal Affairs

G115-006

To: Co. Atty. 3/5/75

Appendix 4—Department of State Letters Confirming Filing of Charters.

Received
Mar 5 1975
Niagara County
Attorney

Mario M. Cuomo
Secretary of State

Maurice Flasterstein
Administrative Director

(Seal)

State of New York
DEPARTMENT OF STATE
162 Washington Avenue
Albany, New York 12231

February 28, 1975

LaVerne S. Graf, Clerk
Niagara County Legislature
Court House
Lockport, New York

Dear Sir:

Please be advised that Local Law No. 2 of 1972 of the County of Niagara was received and filed on February 28, 1975.

We enclose herewith additional forms for the filing of local laws for your future use.

Very truly yours,

BARRY F. BOHAN
Barry F. Bohan
Director
State Records and Law Bureau

cc: State Comptroller
Division of Municipal Affairs

G115-006

APPENDIX 5.

Notice of Motion to Vacate Judgment.

(Same Title.)

This is a motion brought on behalf of the Town of Lockport and Floyd Snyder, intervening defendant-appellants, pursuant to Rule 60 of the Federal Rules of Civil Procedure, for an order vacating the judgment of this Court in the above proceeding entered on January 9, 1975.

The grounds of this motion are that the parties to the action, other than the intervening defendant-appellants, have by their actions rendered the judgment moot, and have by those actions precluded or attempted to preclude the intervening defendant-appellants from obtaining any meaningful relief as to the said judgment on the appeal presently pending to the Supreme Court of the United States.

PLEASE TAKE NOTICE, that this motion will be brought on for argument before this Court at 11:00 a.m., Tuesday, May 27, 1975

VICTOR T. FUZAK, ESQ.
Victor T. Fuzak
Attorney for Intervening
Defendant-Appellants
1800 One M & T Plaza
Buffalo, New York 14203
Telephone: 856-4000

Dated: Buffalo, New York, May 22, 1975

Affidavit in Support of Motion to Vacate.

(Same Title.)

State of New York,
County of Erie. } ss.:

VICTOR T. FUZAK, being duly sworn, deposes and says:

1. I am the attorney for the intervening defendant-appellants, Town of Lockport and Floyd Snyder. This affidavit is made and filed in support of an application by those parties under Rule 60 of the Federal Rules of Civil Procedure for an order vacating the judgment of this Court entered on January 9, 1975.

2. In connection with a motion by the intervening defendant-appellants filed on May 9, 1975 for an order staying the enforcement of the judgment and order of January 9, 1975, it was disclosed to the Court and to counsel for the intervening defendant-appellants that the Niagara County officials and New York State officials involved in the action have, with the stated concurrence of the plaintiffs in the action, determined not to proceed pursuant to the judgment of this Court entered January 9, 1975 by filing, certifying and implementing Niagara County Local Law No. 1 of 1972 or the so-called 1972 Charter, which were the subject of the action, but instead to attempt to file, certify and implement a Local Law purportedly adopted in a 1974 referendum which would put into effect a different proposed Charter. The effect of this action on the part of the other parties to the proceeding is to make the judgment of January 9, 1975 meaningless and to render the specific issue determined by that judgment, that is, the validity of the 1972 Local Law and proposed Charter, entirely moot. The effect also is to deprive the intervening defendant-appellants from obtaining any meaningful relief from the

judgment of January 9, 1975 through a reversal of that judgment on the pending appeal to the Supreme Court. Inasmuch as the parties to the proceeding have elected not to proceed in accordance with the judgment of January 9, 1975, and have elected not to attempt to place into effect and to enforce the proposed Charter purportedly adopted on the referendum in 1972, those parties have effectively removed any justiciable issue from the Federal Court and have effectively precluded the granting of the relief sought by this action and incorporated in the judgment of January 9, 1975 and any meaningful reversal of that judgment. By determination and election of the other parties to this action, the 1972 Charter has been abandoned.

The consequence of the actions of the other parties to this proceeding is reflected in the statement made in the affidavit of the Niagara County Attorney filed in connection with the intervening defendant-appellants' motion for stay, and verified on May 15, 1975. In that statement the Niagara County Attorney advised the Court and counsel that the parties are not proceeding pursuant to the 1972 Charter, but in fact are attempting to proceed pursuant to a new and different Charter purportedly adopted on referendum in November 1974:

> "The Election to occur in November of 1975 for the office of county executive has nothing to do with the 1972 Charter approved by this Court. Subsequent to the Court's judgment, the County of Niagara duly filed a Charter which was approved by the voters on the 5th day of November, 1974 and filed by the State of New York, and which is now the official document for the governance of the County of Niagara. Since the judgment of the Court in regard to the 1972 Charter relates to a Charter in the year 1972 and nothing more, this Court has ab-

solutely no jurisdiction to prevent the County of Niagara from having a Charter government or holding elections pursuant to the Charter which was passed in 1974."

3. It is apparent that the other parties to this proceeding take the position that submission of a new and different Charter to the voters in November 1974, and the purported approval obtained by the voters of that new and different Charter, has the effect of superseding and rendering inoperative and ineffective the proposed Charter purportedly adopted on referendum in 1972. As the Niagara County Attorney has indicated in his papers and in his oral argument on the motion for stay, the January 9, 1975 judgment of the Court in regard to the 1972 Charter relates to a nonexistent, unenforceable, and superseded Local Law which, even assuming the validity of the January 9, 1975 judgment, cannot be put into effect or relied upon as the official document for the governance of the County of Niagara. As also disclosed by the affidavit of the Niagara County Attorney, an application was made to the Court in this proceeding prior to the time of entry of judgment that the judgment apply not to the 1972 proposed Charter which was the subject matter of the proceeding, but instead, to the 1974 Charter which it was asserted was approved upon referendum in November 1974. As was pointed out to the Court by the Niagara County Attorney's letter of December 10, 1974 (attached to the affidavit of the Niagara Attorney verified May 15, 1975): "The 1974 Charter contains a provision which indicates that it supersedes any and all other prior Charters (see Article I, Section 101, 1974 Charter)." This Court refused to grant that application; the January 9, 1975 judgment was settled and filed to relate specifically and solely to the 1972 Charter.

This action was brought for the specific and express purpose of obtaining an order and judgment ". . . enjoining

and directing the defendants to accept proposition No. 5, the proposed Local Law No. 1, 1972, in relation to the adoption of a Niagara County Charter, and to file the same in their respective offices upon due service of a certified copy of an order of this Court to said effect", and directing that an election pursuant to the proposed 1972 Charter be ordered at the earliest feasible time (see Amended Complaint). During the pendency of this case, the parties took actions the effect of which were to destroy the 1972 Charter as an enforceable law regardless of whether this Court should provide the relief sought in the action or not. That action was the submission to the voters of a new and different Charter, which by its express terms would supersede any and all prior Charters, including the proposed 1972 Charter. It is apparent therefore that there is no justiciable issue before the Court and that the parties other than the intervening defendant-appellants have rendered the entire matter and this Court's judgment moot. The 1974 Charter and the governmental and referendum procedures relating to it were not, and are not, of course, in any way a part of the proceeding in this action. Accordingly, as both plaintiffs and defendants have advised the Court on the motion for a stay, the January 9, 1975 judgment has nothing whasoever to do with the 1974 Charter approved by the Court. The plaintiffs in this proceeding have taken no action to require the defendants to comply with the January 9, 1975 judgment by filing, certifying and implementing the 1972 Charter. On the contrary, by letter dated May 20, 1975, counsel for the plaintiffs specifically advises the Court as follows: "The plaintiffs do not object to the action of the New York Secretary of State and the County of Niagara to implement the 1974 Niagara County Charter." It is, of course, quite obvious that as drafted, proposed and now purportedly certified and filed, the 1974 Charter supersedes and totally negates the 1972 Charter, which in any event was never put into effect or acted upon.

4. Submitted with this motion is a brief memorandum of law confirming this Court's jurisdiction to vacate its judgment of January 9, 1975 pursuant to Rule 60(b) of the Rules of Civil Procedure, and establishing the necessity and propriety of that action on the grounds that the purported issue in the proceeding has been rendered moot and that the judgment of January 9, 1975 cannot, by reason of the actions of the parties themselves, be enforced or carried out. Accordingly, the intervening defendant-appellants respectfully request that the Court vacate the judgment filed and entered in this proceeding on January 9, 1975 and award costs to this Court and also with respect to the filing and prosecution of the pending appeal to the Supreme Court.

VICTOR T. FUZAK.

Subscribed and sworn to before me
this 22nd day of May, 1975,
Geraldine A. Stanczewski,
(Seal) Notary Public, State of New York,
Qualified in Erie County.
My Commission Expires March 30, 1977.

Answering Affidavit in Opposition to Motion to Vacate Judgment.

(Same Title.)

State of New York,
County of Niagara. } ss.:

MILES A. LANCE, being duly sworn, deposes and says:

1. He makes this affidavit in opposition to a motion to vacate a judgment of this Court dated January 9, 1975, establishing a charter adopted by the electorate of the County

of Niagara by referendum on November 7, 1972. This motion was made by attorney for plaintiff-intervenor. In contradiction to the moving papers, these respondents did, in fact, implement the 1972 charter by filing it with the New York State Secretary of State and that State official duly filed the same.

2. It is said that the judgment in question is absolutely moot and of no effect. We ask, if that is the case, why bother to make this motion? The answer has to be that movant believes that should the Court grant his judgment it will destroy the effect of the adoption and filing of the charter which was effective in 1974, and pursuant to which elections are being planned to be conducted. These respondents continue to reiterate that the only way the 1974 charter for the County of Niagara can be muted is by a separate independent action to disestablish it and by a request by plaintiff-intervenor for a stay in such a new and independent action. This district court has absolutely no jurisdiction to vacate a judgment that has no intrinsic prospective application.

3. Rule 60 of the Rules of Civil Procedure, particularly subdivision (b), allows only six grounds for vacating a judgment of this nature, none of which apply to the facts of this action. There is no prejudice to the plaintiff-intervenor by the continued existence of this judgment, but there could be prejudice to the respondents, Graf and Comerford, because if the judgment is vacated, plaintiff-intervenor would then claim that the 1974 charter is invalid and accomplish by indirection what conceivably they could not accomplish by a direct law suit involving the 1974 charter.

WHEREFORE, the answering respondents request that this motion be dismissed.

MILES A. LANCE.

Subscribed and sworn to before
me this 28th day of May, 1975
Margaret L. Chambers
Notary Public, State of New York
Qualified in Niagara County
My Commission Expires March 30, 1977

Supplemental Affidavit in Support of Motion to Vacate Judgment.

(Same Title.)

State of New York, }
County of Erie. } ss.:

VICTOR T. FUZAK, being duly sworn, deposes and says:

1. This supplemental affidavit is filed in order to bring to the Court's attention the Reply of the Niagara County defendants to the Jurisdictional Statement filed by the intervening defendant-appellants with the Supreme Court. Copies of this Reply were served upon deponent yesterday. A copy of the Reply is annexed to this affidavit.

2. We call the Court's attention to point III of that Reply in which the Court is advised that since the 1972 Charter has been "supplanted and superseded" by the purported 1974 Charter, it "would be a mere theoretical exercise having no legal consequence" for the Supreme Court "to decide this action". In other words, since the original parties to this action have destroyed the subject matter of the action, no justiciable issue remains, the judgment of this Court has been rendered meaningless, and successful appeal from the judgment by the

intervening defendant-appellants would provide meaningless and ineffective relief. As the Reply states: "The question before the Court in regard to the 1972 charter is now moot."

3. This admission and concession that this case has become moot by reason of the actions of these parties requires that the judgment of this Court of January 9, 1975 be vacated by this Court. It is clear that the original parties to this proceeding have misused and abused that judgment. It is clear that the original parties to this action are attempting to use the judgment as the basis for attempted implementation of a 1974 Charter, while at the same time putting the judgment beyond the reach of the Court on appeal through destruction of the subject matter of the action. This design and purpose is further confirmed by the affidavit of Assistant Niagara County Attorney Lance verified May 28, 1975 in which the statement is made: "This district court has absolutely no jurisdiction to vacate a judgment that has no intrinsic prospective application." In sum, the proceeding has become moot, there is nothing as to which the judgment of January 9, 1975 can apply, and that judgment should be vacated.

s/ VICTOR T. FUZAK.

Subscribed and sworn to before
me this 30th day of May, 1975
s/ Carole L. Zeiher
Notary Public, State of New York
Qualified in Erie County
My Commission Expires March 30, 1976

(Reply to Jurisdictional Statement not reproduced.)

Affidavit in Opposition to Motion to Vacate Judgment (Shedd).

(Same Title.)

State of New York, }
County of Erie. } ss.:

FRANCIS W. SHEDD, being duly sworn, deposes and says:

1. That he is the plaintiff-appellee in the above action and is the representative of the voters who were aggrieved by the refusal of the New York Secretary of State to certify the 1972 Niagara County Charter by reason of the provisions of Article 9, § 1(h)(1) of the N. Y. Constitution and § 33(7) of the Municipal Home Rule Law, after said proposed charter received a favorable vote of a majority of the voters in the geographic unit of Niagara County in the 1972 general election.

2. That the decision of the Niagara County Legislature to attempt to move forward with a County Charter form of government in Niagara County in 1974, while this action was pending and undetermined, was consistent with the will of the majority of the voters of Niagara County who expressed their preference for said form of county government in the general election of 1972.

3. That the decision of the N. Y. Secretary of State, upon the entry of the judgment of this Court on January 9, 1975, to certify both of the County Charters approved by a majority of the voters of Niagara County is consistent with said judgment and represents a compliance with the specific direction of this Court as to the 1972 Charter and a voluntary compliance as to the 1974 Charter.

4. The required steps to be taken by the local government officers in Niagara County to implement the 1972 County Charter is to conduct an election for Niagara County Executive and Niagara County Comptroller. The same election would be held pursuant to either the Charter adopted by the voters of Niagara County in 1972 or 1974 by a majority vote.

5. That the differences between the 1972 and 1974 County Charters are (a) the County Attorney is appointed by the County Executive in the 1974 Charter; (b) the Budget Office is accountable to the County Executive in the 1974 Charter. Otherwise, the two Charters are identical.

6. That the issue now raised by the motion of the intervenor defendant Town of Lockport has resulted from the omission of the County of Niagara to advise the Court of its intentions to request permission from this Court to hold the elections in question pursuant to the 1974 County Charter as a substantial, if not total, compliance with the judgment of this Court of January 9, 1975 which enforced the suffrage rights of the voters of Niagara County to a County Charter form of local government.

7. That the issue of the Charter implementation is not ripe since it will arise only upon the certification of the ballot positions to be filled in the 1975 general election by the N. Y. Secretary of State on August 21, 1975 in accordance with § 69 of the New York Election Law.

8. That in the interim your deponent will apply to this Court for permission to conduct the election pursuant to the 1974 County Charter on the ground that such an election is in compliance with the January 9, 1975 judgment of this Court.

9. That in any event, the motion of the intervenor defendant has no merit since the primary determination by this Court in the form of a declaratory judgment that Article 9, § 1(h)(1) of the N. Y. Constitution and § 33(7) of the N. Y. Municipal Home Rule Law are unconstitutional in violation of the equal suffrage guarantees of the Equal Protection Clause of the Fourteenth Amendment remain in existence and are capable of repetition, yet evading review. *Moore vs. Ogilvie*, 394 U.S. 814, 89 S.Ct. 1493 (1969). Therefore, there continues to be a justiciable issue of the constitutional rights of the voters of the State of New York under the Constitutional and statutory provisions in question.

FRANCIS W. SHEDD.

Subscribed and sworn to before me
this 2nd day of June, 1975.
George R. Grasser,
Notary Public, State of New York,
Qualified in Erie County.
My Commission Expires March 30, 1976.

APPENDIX 6.

District Court Decision and Order Denying Motion to Vacate Judgment.

(Same Title.)

Appearances:

Moot, Sprague, Marcy, Landy, Fernbach & Smythe (John J. Phelan, Esq., of Counsel), Buffalo, New York, for Plaintiffs.

Louis J. Lefkowitz, Esq., Attorney General, State of New York (Michael G. Wolfgang, Esq., of Counsel), Buffalo, New York, for Defendants Ghezzi and Levitt.

Samuel L. Tavano, Esq., Niagara County Attorney, Lockport, New York, for Defendants Graf and Comerford.

Hodgson, Russ, Andrews, Woods & Goodyear (Victor T. Fuzak, Esq., of Counsel), Buffalo, New York, for Intervening Defendants.

Intervenors Town of Lockport and Floyd Snyder have moved to vacate the judgment of January 9, 1975 allowing implementation of the 1972 Charter because Secretary of State Ghezzi has also certified the 1974 Charter.

After considering all the papers and oral argument, I conferred with Judges William H. Timbers and Harold P. Burke. They concur with my judgment that the motion to vacate should be denied. The reasons underlying intervenors' application are not, in the Court's opinion, within the purview of Fed. R. Civ. Proc. Rule 60.

So ordered.

JOHN T. CURTIN,
United States District Judge.

Dated: June 11, 1975.

Supreme Court, U. S.
FILED
JUL 10 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1974

No. 74-1390

TOWN OF LOCKPORT, NEW YORK, and FLOYD SNYDER, Individually and as Supervisor of the Town of Lockport,
Appellants,

vs.

CITIZENS FOR COMMUNITY ACTION AT THE LOCAL LEVEL, INC. and FRANCIS W. SHEDD, Individually and on Behalf of All Others Similarly Situated,
Appellees,

and

JOHN J. GHEZZI, Secretary of State of the State of New York, ARTHUR LEVITT, Comptroller of the State of New York, LAVERNE S. GRAF, Clerk of the County Legislature, County of Niagara, New York and KENNETH COMERFORD, County Clerk, County of Niagara, New York,
Appellees.

APPEAL FROM A THREE JUDGE COURT OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NEW YORK.

BRIEF OF APPELLEES, CITIZENS FOR COMMUNITY ACTION AT THE LOCAL LEVEL, INC. and FRANCIS W. SHEDD, Individually and on Behalf of All Others Similarly Situated ON THE QUESTION OF MOOTNESS

WELLES V. MOOT,
and
JOHN J. PHELAN,
2300 Erie County Savings Bank Building,
Two Main Place,
Buffalo, New York,
for
MOOT, SPRAGUE, MARCY, LANDY, FERNBACH & SMYTHE,
Buffalo, New York,
Attorneys for Appellees, Citizens for Community Action at the Local Level, Inc. and Francis W. Shedd, Individually and on Behalf of All Others Similarly Situated.

BATAVIA TIMES, APPELLATE COURT PRINTERS
A. GERALD KLEPS, REPRESENTATIVE
BATAVIA, N. Y. 14020
716-343-0457

INDEX.

	Page
Statement	1
I. The process of implementation of the 1972 Niagara County Charter	2
II. How the question of mootness was introduced into this case	2
III. Furthermore, this case is not moot because the provision of the New York Constitution, Article 9 § 1(h)(1) which violates the guarantee of equal suffrage contained in the equal protection clause of the Fourteenth Amendment remains in force and effect	5
Conclusion	6
Appendix A—Section 67, Election Law of the State of New York	7
Appendix B—Letter of appellee CALL to appellee Niagara County Clerk Comerford	8
Appendix C—Petition in Article 78 Proceeding in Supreme Court of the State of New York by Intervenor Appellant Town of Lockport, to Void Certification of 1974 County Charter	11

TABLE OF CASES.

Moore vs. Ogilvie, 394 U.S. 814, 89 S.Ct. 1493 (1969)	5
Southern Pacific Terminal Co. vs. Interstate Commerce Commission, 219 U.S. 498, 31 S.Ct. 279 (1911)	5
Super Tire Engineering Co. vs. McCorkle, 416 U.S. 115, 94 S.Ct. 1694 (1974)	5

II.

STATUTES AND CONSTITUTIONAL PROVISIONS.

	Page
New York Civil Practice Law and Rules, Article 78 ..	4, 5
New York Constitution, Article 9, Section 1(h)(1)	3, 5
New York Election Law, Section 67	2

IN THE

Supreme Court of the United States

October Term, 1974

No. .....

TOWN OF LOCKPORT, NEW YORK and FLOYD SNYDER, Individually and as Supervisor of the Town of Lockport,
Appellants,

vs.

CITIZENS FOR COMMUNITY ACTION AT THE LOCAL LEVEL, INC. and FRANCIS W. SHEDD, Individually and on Behalf of All Others Similarly Situated,

Appellees,

and

JOHN J. GHEZZI, Secretary of State of the State of New York, ARTHUR LEVITT, Comptroller of the State of New York, LaVERNE S. GRAF, Clerk of the County Legislature, County of Niagara, New York and KENNETH COMERFORD, County Clerk, County of Niagara, New York,

Appellees.

Statement.

Appellees, Citizens for Community Action at the Local Level, Inc. and Francis W. Shedd (hereinafter referred at as

appellee Call), the successful plaintiffs in the District Court, declare that mootness is not an issue upon this appeal and advise this Court that, as representatives of the class of aggrieved voters in this action, they are enforcing the injunction of the District Court to implement the 1972 Niagara County Charter.

I

The process of implementation of the 1972 Niagara County Charter.

The appellee Kenneth Comerford, the County Clerk of Niagara County, is required to initiate the implementation of the 1972 County Charter by certifying to the Niagara County Board of Elections, the county offices to be placed on the ballot within three months of the 1975 general election, pursuant to § 67 of the New York Election Law. *17 McKinney's Cons. Laws of New York, Election Law § 67* (added 1949) (Appendix A herein). The appellee Call has advised Mr. Comerford that he must implement the 1972 County Charter in accordance with the injunction granted by the District Court. The appellee Call has further advised appellee Comerford that if he does not specifically comply with the judgment of the District Court, appellee Call will take appropriate steps in the District Court immediately to enforce the judgment. The letter to appellee Commerford is contained herein as Appendix B.

II

How the question of mootness was introduced into this case.

This action arose out of a referendum in Niagara County, New York in the 1972 general election.

While the action was pending and undetermined, a second charter referendum was held in the 1974 general election. The result of the referendum was the same as 1972; a majority of the voters of Niagara County, who voted upon the proposition, approved the proposition. The voters in the area outside the three cities of Niagara County disapproved the County charter.

The judgment in the action declaring Article 9 § 1(h)(1) of the New York Constitution in violation of the Fourteenth Amendment and enjoining the implementation of the 1972 County Charter was granted on January 9, 1975. On February 19, 1975, the Attorney General of the State of New York made a public statement that he would not appeal the judgment of the District Court.

On February 26, 1975, the Secretary of State of the State of New York received and filed the 1972 County Charter as he was enjoined and directed by the Court below. On the same date, he received and filed the 1974 County Charter.

On March 5, 1975, the District Court granted the motion to intervene of the Town of Lockport, New York and Floyd Snyder, individually and as Supervisor. On March 6, 1975, the intervenor appellant filed a notice of appeal to this Court.

The Niagara County Attorney thereafter advised the District Court that his clients, which included the appellee Kenneth Comerford, would implement the 1974 County Charter without seeking a further order from the District Court. The Niagara County appellees, throughout this suit, have opposed a declaration of unconstitutionality of Article 9 § 1(h)(1) of the New York Constitution. They would achieve their limited interest by obtaining a County Charter form of government, without the declaration of the voters' constitutional right of equal suffrage which the appellee Call has sought in this action.

The Niagara County appellees, according to the County Attorney, prefer to implement the 1974 County Charter, which was drafted as a successor to the 1972 County Charter and granted the Niagara County Executive additional powers.

The attorney for the intervenor appellant Town of Lockport immediately seized upon the representation by the Niagara County Attorney as a means of obtaining an advantage in his efforts to overturn the judgment of the District Court so that the only charter with which he would have to contend would be the 1974 County Charter. He moved to vacate the judgment of the Court below on the ground of mootness which motion was denied by the District Court on June 11, 1975.

The Niagara County Attorney, upon the assumption that a defense of mootness would limit the constitutional effect of the decision of the District Court, raised the issue of mootness in his "Reply to the Jurisdictional Statement" and precipitated the inquiry from this Court, which the appellee Call now addresses.

On June 27, 1975, the intervenor appellant Town of Lockport, in its latest application for judicial relief, commenced a special proceeding in the Supreme Court of the State of New York pursuant to Article 78, *7B McKinney's Cons. Laws of New York, CPLR, Article 78, Proceeding Against Body or Officer (Added 1962)*, to revoke and rescind the certification of the 1974 Niagara County Charter by the New York Secretary of State on the ground that such charter has not been adopted and approved in accordance with the New York Constitution or the New York Municipal Home Rule Law. This proceeding is returnable July 22, 1975.

The decision of the New York Secretary of State, who undertook to receive and file the 1974 County Charter applying the decision of the District Court in this case and, we assume,

the decisional law in this Court interpreting the Equal Protection clause of the Fourteenth Amendment of the U.S. Constitution, would appear to raise a significant issue of law. The petition in the Article 78 proceeding in the Supreme Court of the State of New York to void the certification of the 1974 County Charter is annexed hereto and designated Appendix C.

III

Furthermore, this case is not moot because the provision of the New York Constitution, Article 9 § 1(h)(1) which violates the guarantee of equal suffrage contained in the equal protection clause of the Fourteenth Amendment remains in force and effect.

The "capable of repetition yet evading review" rule of this Court is clearly appropriate in this case. *Southern Pacific Terminal Co. vs. Interstate Commerce Commission*, 219 U.S. 498, 31 S.Ct. 279 (1911); *Moore vs. Ogilvie*, 394 U.S. 814, 89 S.Ct. 1493 (1969); *Super Tire Engineering Co. vs. McCorkle*, 416 U.S. 115, 94 S. Ct. 1694 (1974).

Conclusion.

The aggrieved voters of Niagara County who initiated this action to enforce their constitutional right of equal suffrage will vigilantly enforce the rights that have been defined in the District Court on behalf of the class of voters they represent. The justiciable issue in this case, the right of a majority of the voters of Niagara County to the County Charter form of local government approved in 1972, is being currently implemented. There is no question of mootness for this Court to consider.

Respectfully submitted,

WELLES V. MOOT, ESQ.,
and
JOHN J. PHELAN, ESQ.,
Attorneys for Appellees,
Citizens for Community Action at the Local Level, Inc. and Francis W. Shedd, Individually and on Behalf of All Others Similarly Situated.

July, 1975.

APPENDIX A.

Section 67, Election Law of the State of New York.

§ 67. *Certificates by Secretary of State and City, Village and Town Clerks as to offices to be filled at General or Special Election.*

The Secretary of State shall, at least three months before each general election make and transmit to the board of elections of each county, and of the city of New York, a certificate stating each officer, except county, city, village and town officers, and including senators and members of assembly who lawfully may be voted for at such election by the voters of the county or of such city, or any part thereof. Each county, city, village and town clerk shall within the same time make and transmit to the board of elections a certificate stating each county, city, village or town officer, respectively, not including senators or members of assembly, to be voted for at such election. If any such officer is to be elected to fill a vacancy, the certificate shall so state. The Secretary of State shall forthwith, upon the filing in his office of the governor's proclamation ordering a special election, make and transmit to the board of elections in each county in which the special election is to be held, a notice of such proclamation and a like certificate of the officers to be voted for at such special election. L.1949, c. 100, eff. March 9, 1949.

APPENDIX B.

Letter of appellee CALL to appellee Niagara County Clerk Comerford.

MOOT, SPRAGUE, MARCY, LANDY,
FERNBACH & SMYTHE
Attorneys at Law

July 2, 1975

The Honorable Kenneth Comerford
County Clerk, Niagara County
Niagara County Courthouse
Lockport, New York 14094

Re: Citizens for Community Action at the Local Level, Inc. and F. Shedd vs. John J. Ghezzi, *et. al.* and Floyd Snyder; Civil No. 1973-222
Our File No. 73-233-2

Dear Sir:

This letter is intended to advise you concerning the position of the appellees CALL and Shedd in the above entitled action which is on appeal to the Supreme Court of the United States.

The judgment of the three-judge United States District Court in the above entitled action granted on January 9, 1975 enjoins and directs you to implement the County Charter which was the subject of a referendum in Niagara County in the general election of 1972.

§67 of the Election Law of the State of New York requires you to certify to the Niagara County Board of Elections the county offices to be filled in the 1975 general election within three months of the date of the general election.

The application of the aforesaid injunction to your responsibility pursuant to such section of the Election Law requires

that you certify to the Niagara County Board of Elections, on or prior to August 1, 1975, that the office of Niagara County Executive is to be filled in the 1975 general election; pursuant to the 1972 County Charter for the County of Niagara, which a duly empowered U. S. District Court has directed and enjoined, shall be implemented as the instrument of local government for Niagara County.

An unusual occurrence has taken place concerning the appropriate governing instrument for Niagara County since the granting of such judgment, *i.e.*, the certification by the Secretary of State of the State of New York of the County Charter which was the subject of a referendum in the general election of 1974 as well as the certification of the 1972 County Charter.

Thereafter, the County Attorney of Niagara County undertook to speak for the Niagara County defendants and to advise the Honorable John T. Curtin U. S. D. J., one of the members of the three-judge U. S. District Court that the 1974 County Charter will be implemented and not the 1972 County Charter. We have no knowledge whether the Niagara County attorney, who has represented you throughout this suit, has express authorization from you to make this statement.

Therefore, we advise you that you are directed and enjoined by the judgment of the three-judge U. S. District Court to implement the 1972 County Charter unless you receive express authorization from said court to implement the 1974 County Charter as a successor instrument of local government for Niagara County.

In the event that you elect to certify to the Niagara County Board of Elections that the office of Niagara County

Appendix B—Letter of appellee CALL to appellee Niagara County Clerk Comerford.

Executive is to be filled pursuant to the County Charter other than the one expressly authorized by the three-judge U. S. District Court, we will immediately request that the court enforce the injunctive provisions of the judgment granted January 9, 1975.

We are prepared to discuss this subject with you at your convenience, for the regularity and legality of the performance of your duty of office in this instance, specifically your duty pursuant to §67 of the New York Election Law, are of significant public interest.

Sincerely,

JOHN J. PHELAN,
John J. Phelan.

JJP:mm

APPENDIX C.

Petition in Article 78 Proceeding in Supreme Court of the State of New York by Intervenor Appellant Town of Lockport, to Void Certification of 1974 County Charter.

STATE OF NEW YORK
SUPREME COURT—County of Niagara

In the Matter
of

TOWN OF LOCKPORT, New York, and FLOYD SNYDER, Individually and as Supervisor of the Town of Lockport, New York,

Petitioners,

vs.

MARIO M. CUOMO, Secretary of State of the State of New York, ARTHUR LEVITT, Comptroller of the State of New York, LA VERNE S. GRAF, Clerk of the County Legislature, County of Niagara, New York, and KENNETH COMERFORD, County Clerk, County of Niagara, New York, for judgment under CPLR Article 78,

Respondents.

Index No.

Petitioners, by their attorneys, Hodgson, Russ, Andrews, Woods & Goodyear, and Andrews, Pusateri, Brandt, Shoemaker, Higgins & Roberson, complaining of the respondents, allege:

1. The petitioner, Town of Lockport, New York, is, and at all of the times hereinafter mentioned was, a Town of the

State of New York, and the County of Niagara, organized and existing pursuant to the laws of the State of New York.

2. Petitioner Floyd Snyder is, and at all of the times hereinafter mentioned was, a resident of the Town of Lockport, County of Niagara, State of New York, and the duly elected supervisor of the Town of Lockport.

3. Mario M. Cuomo is the duly appointed, qualified, and acting Secretary of State of the State of New York; the said respondent is sued in his official capacity.

4. Respondent Arthur Levitt is the duly elected, qualified, and acting Comptroller of the State of New York; the said respondent is sued in his official capacity.

5. Respondent LaVerne S. Graf is the duly elected, qualified, and acting Clerk of the County Legislature for the County of Niagara, State of New York; the said respondent is sued in his official capacity.

6. Respondent Kenneth Comerford is the duly elected, qualified, and acting Clerk for the County of Niagara, State of New York; the said respondent is sued in his official capacity.

7. Article IX, Section 1(h)(1), of the Constitution of the State of New York, provides as follows:

> "§ 1. BILL OF RIGHTS FOR LOCAL GOVERNMENTS
>
> "Effective local self-government and intergovernmental cooperation are purposes of the people of the state. In furtherance thereof, local governments shall have the following rights, powers, privileges and immunities in addition to those granted by other provisions of this constitution:
>
> • • •
>
> "(h)(1) Counties, other than those wholly included within a city, shall be empowered by general law, or by special law enacted upon county requests pursuant to section two of this article, to adopt, amend or repeal alternative forms of county government provided by the legislature or to prepare, adopt, amend or repeal alternative forms of their own. Any such form of government or any amendment thereof, by act of the legislature or by local law, may transfer one or more functions or duties of the county or of the cities, towns, villages, districts or other units of government wholly contained in such county to each other or when authorized by the legislature to the state, or may abolish one or more offices, departments, agencies or units of government provided, however, that no such form or amendment, except as provided in paragraph (2) of this subdivision, shall become effective unless approved on a referendum by a majority of the votes cast thereon in the area of the county outside of cities, and in the cities of the county, if any, considered as one unit. Where an alternative form of county government or any amendment thereof, by act of the legislature or by local law, provides for the transfer of any function or duty to or from any village or the abolition of any office, department, agency or unit of government of a village wholly contained in such county, such form or amendment shall not become effective unless it shall also be approved on the referen-

dum by a majority of the votes cast thereon in all of the villages so affected considered as one unit."

8. Section 33(7), of the Municipal Home Rule Law of the State of New York, provides as follows:

"§ 33. POWER TO ADOPT, AMEND AND REPEAL COUNTY CHARTERS

"7. A charter law

"(a) providing a county charter, or

"(b) proposing an amendment or repeal of one or more provisions thereof which would have the effect of transferring a function or duty of the county, or of a city, town, village, district or other unit of local government wholly contained in the county, shall conform to and be subject to consideration by the board of supervisors in accordance with the provisions of this chapter generally applicable to the form of and action on proposed local laws by the board of supervisors. If a county charter, or a charter law as described in this subdivision, is adopted by the board of supervisors, it shall not become operative unless and until it is approved at a general election or at a special election, held in the county by receiving a majority of the total votes cast thereon (a) in the area of the county outside of cities and (b) in the area of the cities of the county, if any, considered as one unit, and if it provides for the transfer of any function or duty to or from any village or for the abolition of any office, department, agency or unit of government of a village wholly contained in the county, it shall not take effect unless it shall also receive a majority of all the votes cast thereon in all the villages so affected considered as one

unit. Such a county charter or charter law shall provide for its submission to the electors of the county at the next general election or at a special election, occurring not less than sixty days after the adoption thereof by the board of supervisors. Such a county charter or charter law may provide for the separate submission to the electors at such election of one or more variations of the provisions of such county charter. Any such variation may include, but shall not be limited to, proposed transfers of functions of local government to other units of local government or a class or classes thereof."

9. The aforementioned provisions of the New York State Constitution and of the New York State Municipal Home Rule Law are now, and at all times hereinafter mentioned were, in full force and effect as the law of the State of New York; the said provisions, together with ancillary provisions relating to required procedural conditions to the effectiveness of any local law of a county, governs methods and procedures required to be honored, satisfied and followed with respect to the proposed adoption, approval and effectiveness of a charter law providing for a county charter.

10. On or about August 20, 1974, the Niagara County Legislature adopted a resolution, constituting a proposed new Local Law, designated as Local Law No. 2, for the purpose of establishing a new county charter and a county charter form of government for the County of Niagara. A copy of the said Local No. 2 will be presented to the Court upon the hearing of this Petition, and is incorporated herein by reference.

11. The said Local Law No. 2, in accordance with the aforementioned constitutional and statutory provisions, pro-

vided by its terms that the adoption of the said Local Law No. 2 and of the proposed county charter contained therein, was subject to approval by referendum of the voters of the County of Niagara to be held on November 5, 1974.

12. On November 5, 1974, a referendum was held as required by the New York State Constitution and the Municipal Home Rule Law seeking approval of the said Local Law No. 2 and the proposed new county charter embodied therein by the voters of the County of Niagara.

13. The following votes were cast, tabulated and certified on the referendum of November 5, 1974 with respect to the following question: "Shall Local Law No. 2 of 1974 providing for a change in the present form of county government to a charter form of county government be approved?"

Votes cast in the cities within the County of Niagara	-	18,220 votes in favor, 14,914 votes against;
Votes cast in areas of the County outside of the cities of the County	-	10,665 votes in favor, 11,594 votes against.

14. Under the New York State constitutional and statutory provisions recited above, as in effect at the time of the said referendum on November 5, 1974, and as currently in effect, the proposed Local Law No. 2 containing the proposed new charter for the County of Niagara did not obtain the votes required for approval.

15. Section 27 of the Municipal Home Rule Law of the State of New York provides as follows:

"§ 27. FILING AND PUBLICATION OF LOCAL LAWS

"1. Within five days after a local law shall finally have been adopted, the clerk, or other officer designated by the legislative body, shall file one certified copy thereof in the office of such clerk except that in the case of a county it shall also be filed in the office of the county clerk, one certified copy in the office of the state comptroller and four certified copies in the office of the secretary of state, one of which copies said secretary of state shall forward to the office for local government. In the case of a local law subject to a referendum, however, such local law shall be filed within five days after its approval by the electors, or where the local law was subject to a permissive referendum and no petition was filed requesting the referendum, the local law shall be filed within five days after the time for filing of such petition shall have expired.

"2. Each such certified copy shall contain the text only of the local law without the brackets and without the matter within the brackets, the matter with a line run through it, or the italicizing or underscoring, if any, to indicate the changes made by it, and also have attached thereto a certificate executed by the corporation counsel, municipal attorney or other principal law officer to the effect that it contains the correct text and that all proper proceedings have been had or taken for the enactment of such local law, which certificate shall constitute presumptive evidence thereof, provided that any failure or omission so to certify shall not invalidate such local law.

"3. Notwithstanding the effective date of any local law, a local law shall not become effective before it is filed in the office of the secretary of state.

"4. Subject to the provisions of subdivision three hereof, every local law shall take effect on the twentieth day after it shall finally have been adopted unless a different time shall be prescribed therein or required by this chapter or other provision of law.

"5. Local laws shall be published annually by the secretary of state in a separate volume as a supplement to the session laws.

"6. The clerk shall record all local laws filed in his office in a separate book or books, which shall be indexed by him."

16. Upon information and belief, a certified copy of the proposed Local Law No. 2 was not filed in the office of the Clerk of the Niagara County Legislature within five days after the referendum on November 5, 1974.

17. Upon information and belief, a certified copy of the proposed Local Law No. 2 was not filed in the office of the Clerk of the County of Niagara within five days after November 5, 1974.

18. Upon information and belief, one certified copy of the proposed Local Law No. 2 was not filed in the office of the Comptroller of the State of New York within five days of November 5, 1974.

19. Upon information and belief, four certified copies of the proposed Local Law No. 2 were not filed in the office of the Secretary of State of the State of New York within five days of November 5, 1974.

20. Contrary to and in violation of the above provisions of the Constitution of the State of New York and of the Municipal Home Rule Law of the State of New York, and despite the failure of the proposed Local Law No. 2 embodying the proposed new charter for the County of Niagara to obtain the votes of the electors as required by the said constitutional and statutory provisions, upon information and belief, the respondent Clerk of the Niagara County Legislature, purported to file a certified copy of the said Local Law No. 2 with the County Legislature on or about February 28, 1975.

21. Contrary to and in violation of the above provisions of the Constitution of the State of New York and of the Municipal Home Rule Law of the State of New York, and despite the failure of the proposed Local Law No. 2 embodying the proposed new charter for the County of Niagara to obtain the votes of the electors as required by the said constitutional and statutory provisions, upon information and belief, the respondent Clerk of the County of Niagara, purported to file a certified copy of the said Local Law No. 2 in the office of the Clerk of the County of Niagara on or about February 28, 1975.

22. Contrary to and in violation of the above provisions of the Constitution of the State of New York and of the Municipal Home Rule Law of the State of New York, and despite the failure of the proposed Local Law No. 2 embodying the proposed new charter for the County of Niagara to obtain the votes of the electors as required by the said constitutional and statutory provisions, upon information and belief, the respondent Arthur Levitt, as Comptroller of the State of New York, purported to receive and to file a certified copy of the said Local Law No. 2 in the office of the Comptroller of the State of New York on or about February 28, 1975.

23. Contrary to and in violation of the above provisions of the Constitution of the State of New York and of the Municipal Home Rule Law of the State of New York, and despite the failure of the proposed Local Law No. 2 embodying the proposed new charter for the County of Niagara to obtain the votes of the electors as required by the said constitutional and statutory provisions, upon information and belief, the respondent Mario M. Cuomo, as Secretary of State of the State of New York, purported to receive and to file a certified copy of the said Local Law No. 2 in the office of the Secretary of State of the State of New York on or about February 28, 1975.

24. Upon information and belief, the respondents in this action and the Legislature of the County of Niagara are proceeding and purporting to proceed pursuant to and in accordance with the aforementioned Local Law No. 2, and specifically, have embarked upon procedures with respect to the holding of general elections in November 1975 for the election of a County Executive and a Commissioner of Finance purportedly created by the county charter embodied in the said Local Law No. 2, and with elections for Legislators as specified therein.

25. In acting in the manner and in the fashion described in this Petition, the respondents are acting and proceeding contrary to and in violation of the Constitution of the State of New York, Article IX, Section 1(h)(1), and the Municipal Home Rule Law of the State of New York, Section 33(7), as well as in violation of Section 27 of the Municipal Home Rule Law of the State of New York, and otherwise in violation of the law of the State of New York.

26. The petitioner Town of Lockport is aggrieved by the aforesaid actions inasmuch as: The voters of the Town of Lockport voted against approval or adoption of Local Law No. 2 and against approval of the proposed Niagara County charter in the aforementioned referendum of November 5, 1974, by a vote of 914 votes against, 838 votes in favor; and the said proposed new charter would have material effects upon the government and structure of government of the County of Niagara, of which the said Town of Lockport is a part, and upon the rights, privileges, and duties of the duly elected government of the Town of Lockport.

27. The petitioner Floyd Snyder is aggrieved inasmuch as: The said petitioner is and was a resident of the Town of Lockport and the County of Niagara; the said petitioner voted against the adoption of or approval of the aforementioned local law and the proposed Niagara County charter; the petitioner's rights as an individual voter are transgressed and violated by the actions of the respondents in refusing to comply with the Constitution of the State of New York and the laws of the State of New York duly enacted pursuant thereto, and by the actions of the respondents in purporting to certify the said Local Law No. 2 and the proposed Niagara County charter as duly adopted and as governing law in the County of Niagara.

28. At the time of execution and filing of this Petition, eleven (11) of the twelve (12) towns situated within the County of Niagara have formally adopted resolutions expressing support for the efforts of petitioners to prohibit enforcement of Local Law No. 2 contrary to the express requirements of the Constitution of the State of New York and the Municipal Home Rule Law, two (2) villages within

the County of Niagara have taken such formal action, and in addition, ninety-four (94) other towns and villages throughout the State of New York have taken similar formal action and communicated the same to Petitioners.

29. This proceeding is brought pursuant to CPLR Article 78.

30. The issues involved in this proceeding are of interest within the Niagara County community and to the voters of that community; the issues raised by this Petition relate to the enforcement of constitutional and statutory provisions, and to compliance with those provisions, of interest to all citizens and electors of the County of Niagara.

WHEREFORE, your petitioners respectfully ask for a judgment as follows:

1. Adjudging and declaring that the said 1974 Local Law No. 2 of Niagara County, including the proposed Niagara County charter, has not been adopted and approved in accordance with the applicable provisions of the New York State Constitution or of the Municipal Home Rule Law of the State of New York.

2. Directing the respondents to take such action as may be necessary to revoke and rescind the purported certification of Local Law No. 2, to refrain from taking any actions to certify or declare the said Local Law No. 2 and the proposed Niagara County charter as being properly adopted and approved, and to refrain from taking any actions in purported reliance thereon, with respect to general elections or otherwise.

3. For such other, further or different relief as may be just and proper in the premises.

TOWN OF LOCKPORT,
COUNTY OF NIAGARA,
By: Floyd Snyder,
Supervisor.

Floyd Snyder,
Individually.

Hodgson, Russ, Andrews,
Woods & Goodyear,
1800 One M & T Plaza,
Buffalo, New York 14203,

and

Andrews, Pusateri, Brandt, Shoemaker,
Higgins & Roberson,
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Lockport, New York 14094,

Attorneys for Petitioners.

(Verified June 27, 1975.)

Supreme Court, U. S.
FILED
JUL 21 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1974

No. 74-1390

TOWN OF LOCKPORT, NEW YORK, and FLOYD SNYDER, Individually and as Supervisor of the Town of Lockport,
Appellants,

vs.

CITIZENS FOR COMMUNITY ACTION AT THE LOCAL LEVEL, INC. and FRANCIS W. SHEDD, Individually and on Behalf of All Others Similarly Situated,
Appellees,

and

JOHN J. GHEZZI, Secretary of State of the State of New York, ARTHUR LEVITT, Comptroller of the State of New York, LAVERNE S. GRAF, Clerk of the County Legislature, County of Niagara, New York and KENNETH COMERFORD, County Clerk, County of Niagara, New York,
Appellees.

APPEAL FROM A THREE JUDGE COURT OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NEW YORK.

Reply Brief of Appellee CALL to Appellant's Brief on the Issue of Mootness

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for
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BATAVIA TIMES, APPELLATE COURT PRINTERS
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INDEX.

	Page
I. The appellant is misdirecting this Court in an effort to make a case for mootness	1
A	1
B	2
II. This Court should reject a result which deprives citizens of the prompt benefit of their fundamental constitutional rights	3
III. The concession by appellant in its final point that there is no evidence in this case to refute the invidious discrimination of the New York voting scheme based upon place of residence should be dispositive of this appeal in favor of the aggrieved voters	4
Conclusion	5
Appendix A—Paragraphs VIII, IX, and X of the Plaintiff's Amended Complaint	6

CASES CITED.

Rescue Army v. Municipal Court of Los Angeles, 331 U.S. 549, 67 S.Ct. 1409 (1947)	4
Socialist Labor Party v. Gilligan, 406 U.S. 583, 92 S.Ct. 1716 (1972)	4

CONSTITUTION AND RULE.

Article 9 § 1(h)(1) of the New York Constitution	4
Article 78 CPLR	3

IN THE

Supreme Court of the United States

October Term, 197[illegible]

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TOWN OF LOCKPORT, NEW YORK and FLOYD SNYDER, Individually and as Supervisor of the Town of Lockport,
Appellants,

vs.

CITIZENS FOR COMMUNITY ACTION AT THE LOCAL LEVEL, INC. and FRANCIS W. SHEDD, Individually and on Behalf of All Others Similiarly Situated,
Appellees,

and

JOHN J. GHEZZI, Secretary of State of the State of New York, ARTHUR LEVITT, Comptroller of the State of New York, LaVERNE S. GRAF, Clerk of the County Legislature, County of Niagara, New York and KENNETH COMERFORD, County Clerk, County of Niagara, New York,
Appellees.

I.

The appellant is misdirecting this Court in an effort to make a case for mootness.

A.

The allegation by the appellant contained in the "Appellants' Brief on the Issue of Mootness", that the appellee CALL has concurred in the position of the appellees Graf and

Comerford regarding the implementation of the 1974 Charter rather than the 1972 Charter is utterly groundless. The inaccurate allegation against the appellee CALL is repeated throughout the appellants' brief on the subject (ps. 4, 6, 7, 9 and 11). In addition, the appellant imprecisely and repeatedly charges the "respondents" with abandoning the 1972 Charter (ps. 2, 3, 4, 5, 7, 11 and 13).

The appellee CALL has stated in the District Court consistently and in its brief in this Court that the judgment of the District Court must be complied with fully. The appellee CALL has pledged to vigilantly enforce the judgment of the District Court in all respects particularly the injunctive provisions of the decree enforcing the declaration of constitutional rights of the aggrieved voters.

B.

The circumstance of the certification of the 1974 Charter by the Secretary of State of the State of New York was first disclosed to the District Court and to the appellee CALL by the Niagara County Attorney on May 19, 1975 (motion for Stay; App. 1, Brief of Appellant on Issue of Mootness). The appellee CALL was asked to comment by the District Court (John T. Curtin U.S.D.J.). The District Court was advised that the appellee CALL would have no objection to the 1974 Charter being implemented as a successor charter if the District Court specifically authorized such action by an amendatory order in furtherance of the substantive equal suffrage rights declared by the District Court.

Thereafter, on the motion to vacate the judgment of the District Court on the ground of mootness (June 2, 1975), the appellee CALL stated that, in order to clarify the Charter question, it would request the District Court to authorize the implementation of the 1974 County Charter as a successor instrument to the 1972 County Charter in view of the voluntary

action of the New York Secretary of State: since such action was consistent with the declaration of rights and injunctive relief granted by the District Court (aff. of appellee F. Shedd, Appendix 5, p. 55, Brief of Appellant on Issue of Mootness). Such an application was contingent upon the certification of the 1974 County Charter by the New York Secretary of State achieving finality. Such finality has not occurred as a result of the proceeding under Article 78 CPLR commenced by the appellant on June 27, 1975, to void the certification by the Secretary of State.

II.

This Court should reject a result which deprives citizens of the prompt benefit of their fundamental constitutional rights.

The constitutional rights of the aggrieved voters, the Niagara County voters who voted in the majority for a Charter form of local government, have been in suspension since January 1, 1973. Their rights have been determined judicially in regard to the 1972 County Charter. The only Charter capable of immediate implementation is the 1972 Charter. The aggrieved voters are entitled to the earliest realization of their fundamental constitutional rights.

The aggrieved voters should not be deprived of the rights they have now achieved in the District Court. Only through the steady enforcement of the rights of the aggrieved voters which flow from the County Charter referendum will the aggrieved voters have the charter form of local government and the representation by an elected County Executive and County Comptroller to which they are entitled on January 1, 1976.

The State Court proceeding instituted by the appellant, to revoke and rescind the certification by the New York

Secretary of State of the 1974 County Charter on the ground that it violates the double majority provision of the New York Constitution, effectively precludes any present consideration of the 1974 County Charter as a valid and duly adopted successor instrument to the 1972 County Charter.

The appellant urges this Court to defer review of the constitutionality of Article 9 § 1(h)(1) of the New York Constitution until the final determination of the State Court proceeding.

The appellant's strategy is primarily dilatory and evasive. He is repetitiously attempting to enforce in the New York Courts the voting scheme based upon place of residence which the District Court, in this case, declared unconstitutional. Yet the appellant seeks to evade a review now in this Court.

III.

The concession by appellant in its final point that there is no evidence in this case to refute the invidious discrimination of the New York voting scheme based upon place of residence should be dispositive of this appeal in favor of the aggrieved voters.

The reliance of the appellant upon *Socialist Labor Party* vs. *Gilligan*, 406 U.S. 583, 92 S.Ct. 1716 (1972) and *Rescue Army* vs. *Municipal Court of Los Angeles*, 331 U.S. 549, 67 S.Ct. 1409 (1947), in which cases the Court dismissed the appeals because of prematurity and abstractness, is grasping at straws. The constitutional issue in this case was framed in the most clean-cut and concrete fashion in the complaint, was briefed fully by the appellee CALL and was central to the decision of the District Court (app. A, relevant paragraphs of plaintiff's amended complaint).

Conclusion.

There is no issue of mootness for this court to consider. The motion of the appellee CALL to affirm the judgment of the District Court should be granted.

Respectfully submitted,

WELLES V. MOOT, ESQ.,
and
JOHN J. PHELAN, ESQ.,
Attorneys for Appellees,
Citizens for Community Action at the Local Level, Inc. and Francis W. Shedd, Individually and on Behalf of All Others Similarly Situated.

July, 1975.

APPENDIX A.

Paragraphs VIII, IX, and X of the Plaintiff's Amended Complaint.

VIII

That the proposed Local Law No. 1, in relation to the adoption of a Niagara County Charter, was adopted by the Niagara County Legislature on September 6, 1972 and submitted to referendum pursuant to Art. 9, § 1 (h) (1) of the New York State Constitution. That said Niagara County Charter (Exhibit A, abstract) was proposed as the governing instrument for a unit of local government, the County of Niagara, having general governmental powers over the entire geographic area in which no specific group of voters, residents or other persons were primarily affected or interested as compared to another group. Within the geographic boundaries of said unit of local government having general governmental powers, there was contained 3 cities, 5 villages and 12 townships. The general governmental powers and the general responsibility for local government property and affairs to be carried out by the unit of local government to be adopted in the proposed county charter and by the terms of the county law and relevant applicable statutes, were, among others, to set a tax rate, to equalize assessments, to issue bonds, to prepare a budget for the county's needs and to make long term judgments about the way Niagara County should develop—whether industry should be solicited, roads improved, recreation facilities built. The functions to have been performed by said county government pursuant to the proposed Niagara County Charter were to have affected all the residents of Niagara County uniformally and equally. The proposed county charter government, through the county executive and the county comptroller to have been elected pursuant thereto (See Exhibit A attached), contained

authority to make substantial numbers of decisions affecting all citizens, whether they reside inside the limits of the three cities of Niagara County or in the areas outside of the cities within Niagara County. The county charter government would have maintained buildings, administered welfare services, enforced environmental laws, maintained and improved roads, provided health care and drainage and refuse disposal, mental health services and county planning. Real property taxes were to be levied and equalized upon real property in the county. The operating and capital budget expenditures were assessed uniformly upon all the taxpayers of the entire geographic unit. Finally, by the terms of said charter the terms of office of the members of the Niagara County Legislature were extended to four year terms.

IX

The provisions of Art. 9, § 1 (h)(1) of the New York State Constitution and § 33(7) of the Municipal Home Rule Law of the State of New York, *35C McKinney's Cons. Laws of New York*, § 33(7), which require that (1) no charter or other alternative form of county government or (2) any such form of county government that transfers functions of the cities, towns, villages, districts or other units of government, including the county, to each other or (3) any such form of county government that abolishes one or more offices, departments, agencies or units of government may become effective unless approved on a referendum by a majority of the votes cast in the cities of the county voting as a unit and in the area outside the cities of the county voting as a separate unit is an unconstitutional deprivation of the right of the plaintiff Shedd and other members of the class to the equal protection of the law pursuant to the Fourteenth Amendment in that it

violates the principle of equal representation for equal numbers of people without regard to race, sex, economic status or place of residence within the state.

X

The provisions of Art. 9, § 1 (h)(1) of the New York State Constitution and § 33(7) of the Municipal Home Rule Law of the State of New York, *35C McKinney's Cons. Laws of New York, § 33(7),* which create classifications of voters in each of the counties of the State of New York without any rational justification thereof, without any articulated and permissible state goal and limit the voting franchise of the plaintiff and other members of the class without defining the interests promoted or demonstrating a compelling state interest, constitute a *prima facie* unconstitutional dilution or debasement of the vote of the plaintiff and members of the class based upon the *prima facie* classification in units of voters by reason of their residence in the cities of the county or in the area outside of the cities of the county. A chart of the population of New York State located within the cities of each county and in the area outside of the cities is annexed to the within complaint and designated Exhibit B. Said Exhibit B demonstrates graphically that the classification in the New York State Constitution of voters based upon their residence within the cities or in the area outside of the cities create unequal population voting units but not consistently in favor of city residents or non-city residents but rather creates unconstitutional voting power in favor of resistance to change, in favor of historical rigidity and in furtherance of suspect classification based upon race, sex, economic status and location of residence within the state. The classification deprives this plaintiff and others similarly situated of their constitutional right of equal

representation in the determination of forms of local government of a general governmental nature and of the opportunity to elect public officers to exercise executive and legislative powers of a general governmental nature as a result of the change of the form of said unit of general purpose local government.

Supreme Court, U. S.
FILED
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IN THE

Supreme Court of the United States

October Term, 1974

No. 74-1390

TOWN OF LOCKPORT, NEW YORK, and FLOYD SNYDER, Individually and as Supervisor of the Town of Lockport,
Appellants,

vs.

CITIZENS FOR COMMUNITY ACTION AT THE LOCAL LEVEL, INC. and FRANCIS W. SHEDD, Individually and on Behalf of All Others Similarly Situated,
Appellees,

and

JOHN J. GHEZZI, Secretary of State of the State of New York, ARTHUR LEVITT, Comptroller of the State of New York, LAVERNE S. GRAF, Clerk of the County Legislature, County of Niagara, New York and KENNETH COMERFORD, County Clerk, County of Niagara, New York,
Appellees.

APPEAL FROM A THREE JUDGE COURT OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NEW YORK.

APPELLANTS' RESPONSE TO THE "REPLY BRIEF" OF APPELLEES CALL AND SHEDD ON THE ISSUE OF MOOTNESS

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BATAVIA TIMES, APPELLATE COURT PRINTERS
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INDEX.

PAGE

Appellants' Response to the "Reply Brief" of Appellees CALL and Shedd on the Issue of Mootness 1

A. Appellees CALL and Shedd have made improper and erroneous assertions to this Court in their "Reply Brief" 1

B. It is now apparent that there is serious question as to whether this case was ever a live controversy with adversary parties 7

CASES CITED.

Connor v. Waller (June 5, 1975; No. 74-1509) 10

Hill v. Printing Industries of the Gulf Coast *et al.* (June 30, 1975; No. 74-456) 10

IN THE

Supreme Court of the United States

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APPEAL FROM A THREE JUDGE COURT OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NEW YORK.

APPELLANTS' RESPONSE TO THE "REPLY BRIEF" OF APPELLEES CALL AND SHEDD ON THE ISSUE OF MOOTNESS

A. Appellees CALL and Shedd have made improper and erroneous assertions to this Court in their "Reply Brief".

This is a brief response to the inaccurate and unseemly aspersions published in the "Reply Brief of Appellee CALL to Appellants' Brief on the Issue of Mootness".

Appellee's first-assertion in that brief is that: "I. The appellant is misdirecting this Court in an effort to make a case for mootness." Appellees advise the Court that: "The allegation by the appellant contained in the 'Appellant's Brief on the Issue of Mootness', that the appellee CALL has concurred in the position of the appellees Graf and Comerford regarding the implementation of the 1974 charter rather than the 1972 charter is utterly groundless."

In response, we call the Court's attention to the following facts:

1. On May 20, 1975—in connection with appellants' motion to the District Court for a stay of enforcement of its January 9, 1975 judgment pending this appeal—the attorneys for the plaintiffs-appellees wrote to each member of the three-judge panel stating in part as follows:

• • •

> The plaintiffs do not object to the action of the New York Secretary of State and the County of Niagara to implement the 1974 Niagara County Charter. The decision is a voluntary implementation of the declaration of the right of suffrage of the voters of Niagara County by this Court and is consistent with it.
>
> • • •
>
> The action of the New York Secretary of State and the County of Niagara pertaining to the 1974 charter should not be stayed by this Court since neither that charter nor the action of the state and local government officials pertaining thereto is within the purview of this suit."

Thus, on May 20, 1975, appellees expressly concurred in the actions being taken by the State and County officials in implementing the purported 1974 charter.

2. On June 2, 1975, at the time of oral argument of appellants' motion to the District Court to vacate the judgment of January 9, 1975 on the ground that the proceeding had become moot, the same counsel for appellees had the following to say concerning the position of those parties with reference to proceeding with elections pursuant to the purported 1974 charter:

> Mr. Phelan: • • • "The action of the Niagara County officials in putting the 1974 Charter on the ballot is in full compliance but not in specific authorization by this Court and – – –"
>
> The Court: "That wasn't your action anyway. That was the action of the County."
>
> Mr. Phelan: "That was the action of the County, that's right. Now, our position, the position in the letter I filed on the motion for the stay was that the action of the Secretary of State and the State of New York in certifying the '74 Charter; the action of the County in going ahead with it is completely consistent. • • •
>
> Now, Mr.,—the fact that the County Attorney and the officials of the County have not specifically asked this Court for permission to go ahead in that way consistent with,—I say consistent with the order and judgment of this Court, Mr. Fuzak is attempting, good lawyer that he is, to take advantage of it on the theory and try to work himself within some of the very fine language of the Supreme Court on the mootness question and I respectfully submit that a determination on this motion should be withheld."
>
> • • •
>
> "Now, I suggest and it is our intention on behalf of the aggrieved voters who originated the action to promptly make an application to this Court for permission to have the 1974 Charter put on the ballot, not asking this Court to take jurisdiction over the 1974 Charter and to make any determination with reference to it as was originally asked of the Court, but to merely ask this Court as part of its continuing jurisdiction on the theory that the '74 Charter is virtually identical

to the '72 Charter, it is consistent with the constitutional determination of this Court and complies with and implements the basic judgment of this Court and to ask this Court for permission - - -"

The Court: "We have already decided that against the County, haven't we?"

Mr. Phelan: "You didn't decide that question. What you decided,—what the County asked between the time of decision and at the time a proposed judgment was submitted to the Court was asked the Court to make a substantive determination that the 1974 Charter and the election held under that Charter violated one man, one vote, and obviously the Court could not do that since that was not the justiciable issue that was before it, but it was just like as happened in many of the reapportionment cases, there would be one reapportionment plan before the Court and when the substantive decision has been made the Court enjoins and orders the reapportionment plan to be carried out. The Government has come back in many instances later and said, 'we want to slightly change this plan in this way and this is consistent with the Court's judgment and complies with it and carries it out'.

I think that this Court before any action is taken any way different from what this Court ordered January 9th by County officials, I think this Court ought to permit the action."

The Court: "Are you going to make a motion?"

Mr. Phelan: "Yes. I am going to make a motion promptly and point out the very slight differences between the two charters so that under no circumstances is a collateral issue of this,—of mootness,—under no circumstances will such an issue get into the Supreme Court because of the closely divided Court."

Although this statement was made to the Court on June 2, 1975, no motion has been made.

3. Despite the admission by all appellees that the State and County Officials are not enforcing and have not enforced or acted under the 1972 charter, and that the Federal Courts have not had and do not now have jurisdiction over the 1974 charter, and that the 1974 charter is being enforced and implemented rather than the 1972 charter, and that elections are proposed to be held pursuant to the 1974 charter and not the 1972 charter, counsel for appellee CALL and Shedd advised this Court by letter dated July 9, 1975, as follows:

> "The position of appellees CALL and Shedd is that there is no question of mootness to be considered by the Court because the 1972 County Charter is being enforced in accordance with the injunction of the District Court of January 9, 1975. We submit the motion to affirm the judgment of the District Court should be granted."

4. In an affidavit to the District Court sworn to on June 2, 1975, appellee Shedd made the following representations concerning the position of appellees CALL and Shedd:

> "3. That the decision of the N. Y. Secretary of State, upon the entry of the judgment of this Court on January 9, 1975, to certify both of the County Charters approved by a majority of the voters of Niagara County is consistent with said judgment and represents a compliance with the specific direction of this Court as to the 1972 Charter and a voluntary compliance as to the 1974 Charter.
>
> • • •
>
> 8. That in the interim your deponent will apply to this Court for permission to conduct the election pursuant to the 1974 County Charter on the ground that such an election is in compliance with the January 9, 1975 judgment of this Court."

No such action has been taken by appellees. On the contrary, these appellees have now filed a motion with the District Court seeking an order enjoining the County and

State officials from proceeding under or attempting to enforce the 1974 charter.

5. In a letter dated July 2, 1975 from the attorneys for the appellees CALL and Shedd to the appellee-respondent Kenneth Comerford, County Clerk of the County of Niagara (see Appendix B to Brief of Appellees CALL and Shedd on the Question of Mootness), those attorneys made the following statements and demands:

> "Therefore, we advise you that you are directed and enjoined by the judgment of the three-judge U. S. District Court to implement the 1972 County Charter unless you receive express authorization from said Court to implement the 1974 County Charter as a successor instrument of local government for Niagara County.
>
> In the event that you elect to certify to the Niagara County Board of Elections that the Office of Niagara County Executive is to be filled pursuant to the County Charter other than the one expressly authorized by the three-judge U. S. District Court, we will immediately request that the court enforce the injunctive provisions of the judgment granted January 9, 1975."

6. In Appellees' Reply Brief on the Issue of Mootness (Page 3) the following statement is made to the Court: "The only charter capable of immediate implementation is the 1972 charter."

In view of the above, counsel for the appellees CALL and Shedd certainly transgress the bounds of propriety in falsely accusing appellants of "misdirecting" this Court. The contrary is quite clearly the case. It is quite apparent that the machinations of the respondents and appellees with respect to the two proposed charters constitute an effort to deprive the appellants here from obtaining any meaningful judicial relief. In the vernacular, there is a kind of "shell game" going on with these two charters.

B. It is now apparent that there is serious question as to whether this case was ever a live controversy with adversary parties.

It now appears that all of the original parties to this case—petitioners and respondents as well—are on the same side of the question presented to the District Court for decision. All of those parties, who were presumably in adverse positions to each other when this case was initially submitted, now act in concert to uphold the judgment granted in favor of the petitioners.

It is appropriate therefore for this Court to consider whether this case is or ever was an adversary proceeding out of which the Court below received the benefits of full development and disclosure of relevant facts and meaningful adversary argument of applicable legal principles. If the case has not in fact been a true adversary proceeding, there is of course added reason for declaring mootness and vacating the judgment below. In this regard we ask the Court to consider the following facts:

a) Petitioners and all respondents now apparently openly join to urge affirmance of the judgment below although one would expect that the respondents, if truly adversary to petitioners and their position, would urge this Court to vacate the judgment below.

b) In the action as initially commenced, the named and participating respondents were the Niagara County Officials and the State of New York Officials. The Niagara County Officials were clearly supportive of petitioners' efforts, and not adversaries opposing those efforts. The Niagara County Legislature adopted the 1972 Local Law containing the proposed charter and put it to referendum.

Niagara County itself commenced the first Federal action seeking to have the 1972 charter declared valid and to have the New York State constitutional provisions and the Municipal Home Rule Law Statutory provisions ruled unconstitutional. The same Federal District Court dismissed the action. Accordingly, it is clear that the Niagara County respondents were not true adversaries to petitioners in the case now pending but indeed were and are seeking the same result as petitioners.

c) Since the January 9, 1975 judgment, the Niagara County attorney has pursued every effort to protect that judgment and to proceed with enforcement of the 1974 charter.

d) It now appears that the Attorney General of the State of New York was also not an adversary party. In this respect we cite the following:

i) Although, as noted by the District Court, this was a case of first impression, the Attorney General permitted the matter to be considered and decided by the three-judge panel on summary judgment without benefit of any factual proof establishing the governmental justification and the reasonableness of the constitutional and statutory provisions under attack. This factual information should have been presented to the Court to refute the conclusory claims made by petitioner of "invidious discrimination". The Court was thus deprived of a full record and a full disclosure and exposition of facts relevant and necessary to an informed judgment.

ii) The Attorney General initially advised representatives of various towns in the state, including towns within the County of Niagara, that the Attorney General would appeal the January 9, 1975 judgment to this Court.

However, shortly before expiration of the statutory appeal period, the Attorney General reversed that position and declared that no appeal would be processed. But for the prompt action of appellants in intervening, the January 9, 1975 judgment would have become final without any ruling by this Court on the very substantial constitutional questions raised by that judgment. This is not the action of a true adversary.

iii) New York State Officials who initially refused to certify both the 1972 charter and the 1974 charter, now purport to certify the 1974 charter, and the Attorney General resists all efforts to obtain a ruling of this Court as to the propriety of the January 9, 1975 judgment before proceeding with implementation of the 1974 charter.

iv) The Attorney General's representative made the following remarks to the District Court on May 19, 1975 concerning his present position:

> Mr. Wolfgang: "Your Honor, I am here, of course, to explain what has transpired because obviously there is a question as to the fact situation.
>
> A Charter of 1972 was ordered implemented and was received and certified by the Secretary of State. Almost simultaneously a decision was reached by the Secretary of State and the State of New York not to appeal the Court's judgment. Thereafter a Charter bearing the date 1974 was submitted for certification* and the Secretary of State took the position since the law under which he had rejected had been declared unconstitutional and we were to abide by that section,—we were no longer to abide by that section as ordered by the Court that he would accept and certify the '74 Charter, which has been done."

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* The 1972 and 1974 charters were in fact "certified" by the Secretary of State on the same day, February 28, 1975.

> The Court: "Mr. Fuzak points out and I think this is clear that this particular decision will have far reaching, much more far reaching impact than the mere County of Niagara. For example, we had in here an application from the town of,—I believe Huntington, Long Island for a stay and we have all the problems of sewer districts, the annexations and all the rest of it.
>
> What is the Secretary of State's position going to be on all these other things that come up?"
>
> Mr. Wolfgang: "That judgment has not been made as far as I know, sir."

The intervening appellants therefore respectfully submit that there is serious question as to whether this proceeding has from the outset been a true adversary proceeding, or whether it should be regarded as a "friendly" suit among the original parties to achieve the result contained in the January 9, 1975 judgment.

Recent decisions of this Court further mandate a vacatur of the January 9, 1975 judgment and a remand of the case to the District Court. See *Hill vs. Printing Industries of the Gulf Coast et al.* (June 30, 1975; No. 74-456): *Connor vs. Waller* (June 5, 1975; No. 74-1509).

Respectfully submitted,

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